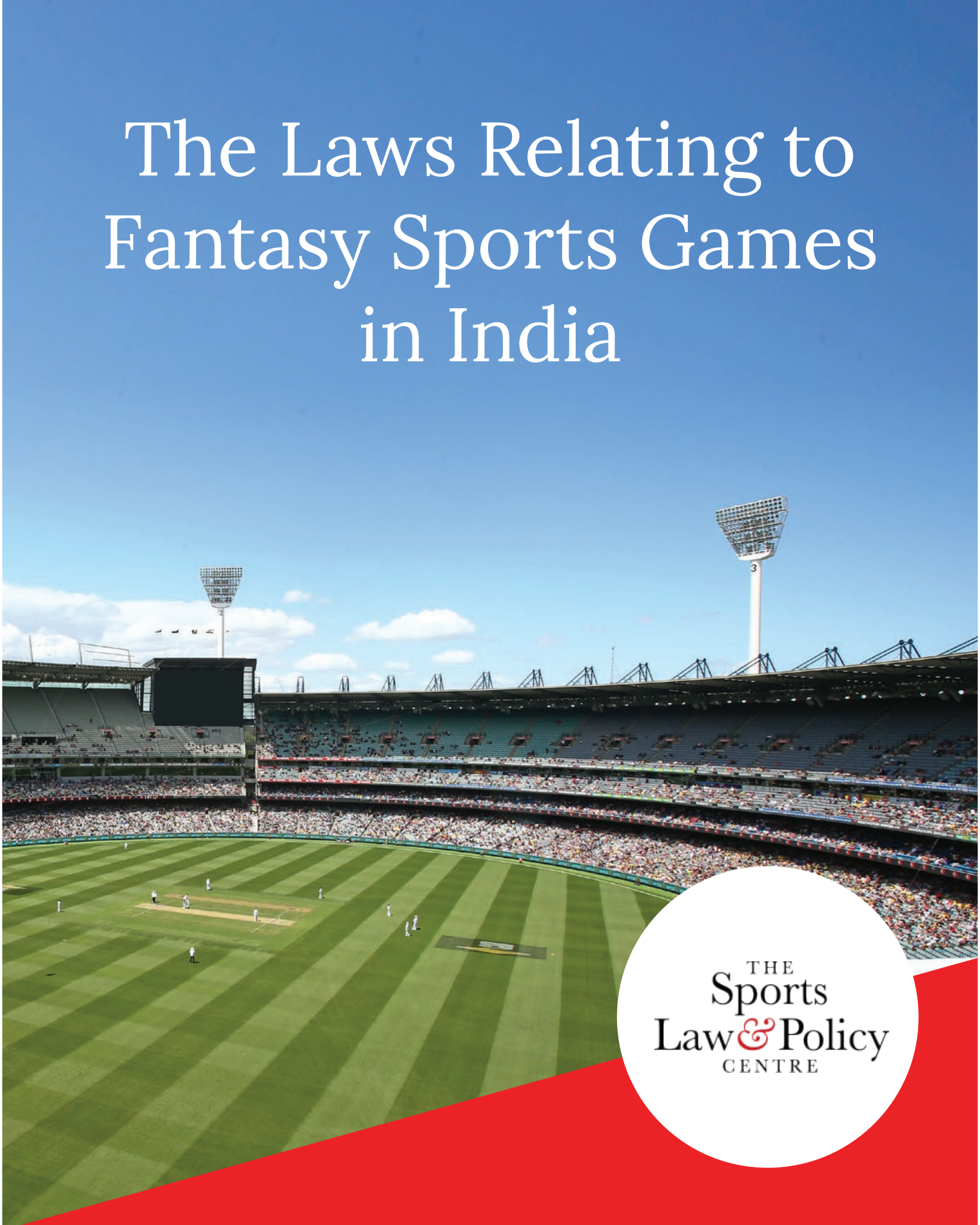
The Laws Relating to Fantasy Sports Games in India



THE Sports Law & Policy CENTRE

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Contact Information

The Sports Law and Policy Centre
First Floor, "Oorve", No. 60,
Munimarappa Road, Off Nandidurga Road,
Behind Airtel Office,
Bangalore - 560046, Karnataka, India
Phone Nos: +91 80 42048046
Email: contact@sportslaw.in

Foreword

Sporting activity has been an intrinsic part of society for centuries. Right from the beginning of modern civilization, the spirit and challenge of competition have motivated people to engage in sports and athletic events. However, the opportunity to participate and engage in elite sports on the field is reserved only for a miniscule percentage of the general population that is blessed with the combination of physical prowess, talent, determination and circumstances that is necessary for a person to become an elite sportsman or sportswoman.

In time, the onus for bridging the participation and engagement gap between elite sports and the general population has been taken up by fantasy sports games, which provide an opportunity for normal people to be deeply engaged in elite professional sports and be a "part of the action". Naturally, this has made fantasy sports games very popular as a form of personal entertainment and involvement for fans over the last two decades and, with respect to India, the last 5 years in particular. This growth has been fuelled in a big way by the advances in technology, the rise in popularity of sports other than cricket, the recognition by event organisers of how fantasy sports can deeply engage fans and the entry of and expansion by several fantasy sports games operators.

All of this has served to bring fantasy sports games squarely into the public spotlight. In order to build trust and confidence in fantasy sports games among the wider public and for the continued growth of this sector, it is incumbent on fantasy sports games operators to ensure that their games are offered and operated in accordance with applicable law, which, in the case of India, includes both central and state laws.

In this context, and as part of our aim to lead research and knowledge dissemination on subjects of contemporary relevance in the sports and gaming sectors, The Sports Law & Policy Centre (SLPC) is privileged to compile and publish 'The Laws Relating to Fantasy Sports Games in India', which comprises a comprehensive collection of articles on the key legal and regulatory aspects of fantasy sports games in India.

The articles have been authored by leading legal practitioners in sports and gaming law in India and together highlight contemporary and critical issues affecting the formulation, regulation and implementation of law and policy in India relating to the fantasy sports games industry.

In the introductory chapter, we provide a summary of the legal framework in India with respect to gaming. In the second chapter, ***Gowree Gokhale*** and ***Rishabh Sharma*** from ***Nishith Desai Associates***, explore the 'skill' element in fantasy sports games with an analysis of the distinct elements and factors of fantasy sports games that qualify them as games of skill under current legal standards. This is followed by a chapter contributed by ***Abhinav Shrivastava*** from ***LawNK*** in which he discusses the concepts of functional equivalence and translation of skill elements from offline to online mediums and *vice versa*, in the particular context of fantasy sports games. The fourth chapter, contributed by ***Nandan Kamath*** and ***R. Seshank Shekar*** from ***LawNK***, explores the legality of 'paid' fantasy sports games in light of recent legislative and judicial developments, and the manner in which such developments may affect or impact the business and operational models of operators of paid fantasy sports games. The fifth chapter, contributed by ***Arun Prabhu*** and ***Rishabh Shroff*** from ***Cyril Amarchand Mangaldas***, delves deep into the use of third party intellectual property rights in fantasy sports games, looking at statistics, player identifications, imagery and team names, logos and other similar properties owned or controlled by governing bodies, leagues and others. ***Ganesh Prasad*** from ***Khaitan & Co*** contributes the final chapter, which makes a persuasive argument for industry driven self-regulation of the Indian fantasy sports games sector. The publication concludes with a ready reckoner that provides an overview of the legal status of fantasy sports games in all of the Indian states and Union Territories.

We would like to conclude by thanking all the authors for their contributions to this publication and for their support in our endeavour of providing a definitive reference point for any reader who is interested in exploring the legal landscape surrounding fantasy sports games in India as it stands. We hope this will contribute to opening up many more conversations, empower the entrepreneurial spirit and lead to developments that balance, benefit and protect the interests of the wide variety of stakeholders involved with fantasy sports games, including operators, fans, players and governing bodies.

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Introduction – Contextualising Gaming Laws in India

Participation and engagement in gaming is a universally practiced and pursued recreational and social activity offering opportunities for consumer engagement, brand promotion, fan-engagement and interest. Games can be in the form of crossword puzzles or quizzes or in more advanced and interactive forms such as card games or fantasy sports.

In regulating those offering such games, Indian laws differentiate between games of skill and games of chance and specify a strict prohibition on participation and offer of games of chance for stakes, while taking a more favourable position with games of skill.

The differential treatment accorded to games of skill and games of chance, with the former permitted and the latter prohibited, has been a historic feature of Indian law. Such differentiation appears to arise out of the historic treatment of gambling in India, whereby despite featuring in Indian culture and history across millennia, it comes attached with negative connotations and a certain stigma[1].

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The two main enactments dealing with gaming in India are the pre-Independence Public Gambling Act, 1867 ("**PGA**") and the Prize Competitions Act, 1955 ("**PCA**").

Current Indian jurisprudence builds on the historic treatment of gambling with the added influence of anti-gambling rhetoric prevalent in Great Britain at the time of the enactment of the PGA.[2] The PGA criminalises the act of gambling in a public forum in India and the keeping of a 'common gaming house', i.e., any enclosed space, in which instruments of gaming are kept or used for profit or gain. However, the PGA distinguishes between betting on a "game of chance" and staking on a "game of skill", ostensibly to provide a safe harbour to activities such as wagering on horse races that were popular and prevalent amongst the British at the time and other games that provided rewards based on a person's skill, knowledge and judgement.

While the PGA's application was limited to the erstwhile British presidencies and states, the adoption of the principles espoused by the statute by state legislation across the majority of Indian states is illustrative of a similar trend to prohibit betting on games of chance while permitting engagement in games of skill.

This position has found resonance with Indian courts as well with judicial reasoning evidencing an aim of discouraging society from taking part in games of chance but not games of skill. Notably, in the case of *State of Bombay v. R. M. D. Chamarbaugwalla*[3], the Bombay High Court examined the historic treatment of gambling as a sinful and pernicious vice.

1 Vivek Benegal, *Gambling Experiences, Problems and Policy in India: A Historical Analysis*, in 108, Addiction, December 2013, 2062–2067.
2 *Id.*
3 AIR 1957 Bom 699.

The Court excluded gambling or conducting the business of gambling from the ambit of the fundamental right to freedom of trade and profession under the Constitution of India[4]. In coming to this conclusion, the Court opined that it found it difficult to accept that activities which encouraged a spirit of reckless propensity for making easy gain by lot or chance could be considered legitimate trade or business undertakings and thereby be entitled to protection as part of the fundamental right to trade and profession guaranteed under Article 19(1)(g) of the Constitution of India.

It should be noted that the PGA does not define which games constitute games of "mere skill". However, the Supreme Court, in *State of Bombay v. R.M.D. Chamarbaugwala*[5], has interpreted the words "mere skill" to include games which are preponderantly of skill and even if there is an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of "mere skill".

With respect to games of chance, judicial precedents have held that a game of chance is a game that is determined entirely by mere luck, the result of which is wholly uncertain and doubtful, and a human being cannot apply his/her mind to estimate the result.[6]

The two principal cases that have addressed the 'skill versus chance' question are *State of Andhra Pradesh v. K. Satyanarayana* ("***Satyanarayana* case**")[7] and *Dr. K.R. Lakshmanan v. State of Tamil Nadu* ("***Lakshmanan* case**")[8]. In both these cases and across judicial precedents concerned with gaming, the courts have recognised that no game is a game of pure skill alone and almost all games involve an element, albeit infinitesimal, of chance. In such circumstances, Indian courts have by and large adopted the 'dominant factor test', or 'predominance test' which requires assessment and determination of whether chance or skill "is the dominating factor in determining the result of the game".

Alongside the PGA and the various state gambling legislations, the PCA provides certain regulatory terms concerned with the offer and operation of prize competitions. A prize competition under the PCA is any competition offered with a prize where the solution is based around the building up or arrangement of letters or figures, such as a crossword prize competition, a missing-word prize competition or a picture prize competition.[9] The PCA sets out various restrictions and limitations applicable to conducting and organising a prize competition. While an express exemption for games of skill is not mentioned in the PCA, the Supreme Court has examined the legislative history and intent of the PCA and excluded games which are predominantly based on skill from the regulatory purview and penalising terms of the PCA.[10]

As per the Seventh Schedule to the Constitution of India (Entries 34 and 62 of List II), the state governments have been authorised to make laws on betting and gambling. Therefore, where a state legislation on gambling exists, it prevails over the PGA, which is a central legislation promulgated earlier in time. Accordingly, in addition to the PGA, a number of states in India have enacted legislation to govern gambling and gaming within these states. These state legislations are mostly in consonance with the PGA, and similarly exempt games where the outcome is predominantly based on skill.

It is in the context of this legal framework that this publication attempts to examine the legal landscape surrounding fantasy sports games in India.

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4 India Const. art. 19(1)(g).
5 AIR 1957 SC 699.
6 Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153; State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825.
7 State of Andhra Pradesh, *supra* note 6.
8 Dr. K.R. Lakshmanan, *supra* note 6.
9 The Prize Competitions Act, 1955, § 2(d).
10 R.M.D. Chamarbaugwalla v Union of India, AIR 1957 SC 628.

The 'Skill' Element in Fantasy Sports Games

By Gowree Gokhale[1] and Rishabh Sharma[2]

Across different jurisdictions in the world, games of skill and games of chance played for stakes are treated differently. Indian laws as well make a distinction between skill games and chance games. The anti-gambling laws of most Indian states ("**Gaming Legislations**") exempt 'games of mere skill'. The Supreme Court of India (the "**Supreme Court**") has interpreted the words 'mere skill' to mean "preponderantly of skill".[3] The Supreme Court has also held that conducting of skill games does not amount to "gambling" but a commercial activity and therefore entitled to constitutional protection.[4]

In this chapter we have analyzed the legislative framework in India with respect to 'games of mere skill' and its application to fantasy sports games.

Skill vs. Chance Debate

Whether a game is of chance or skill is a question of fact to be decided on the basis of facts and circumstances of each case.[5] While deciding the question of "skill versus chance", Indian courts have adopted the test followed by the U.S. courts known as the "dominant factor test", or "predominance test". This test requires a court to decide whether chance or skill "is the dominating factor in determining the result of the game". The Supreme Court has applied this test in relation to card games such as rummy (*Satyanarayana case*[6]) and horse racing (*Lakshmanan case*[7]) in detailed orders.

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Rummy: In the *Satyanarayana case*, the Supreme Court held that the game of rummy is not a game entirely of chance like the 'three-card' games (i.e., 'flush', 'brag', etc.) which are games of pure chance. In all games in which cards are shuffled and dealt out, there exists an element of chance, because the distribution of the cards is not according to any set pattern, but is dependent on how the cards find their place in the shuffled pack. However, the Supreme Court concluded that rummy is a game of skill, as the fall of the cards needs to be memorized and the building up of rummy requires considerable skill in holding and discarding cards. The Supreme Court in this case also observed that bridge is a game of skill.

Horse Racing: The Supreme Court has held that betting on horse racing was a game of skill since factors like fitness, and skill of the horse and jockey could be objectively assessed by a person placing a bet. The relevant skill, therefore, in horseracing is the bettor's ability to assess the horse and jockey.

1 Gowree Gokhale is Partner, Nishith Desai Associates.
2 Rishabh Sharma is Associate, Nishith Desai Associates.
3 State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699.
4 *Id.*
5 Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.
6 State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825.
7 Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.

What are Fantasy Sports Games?

Fantasy sports games are games which involve users drafting fantasy teams based on certain conditions from a list of players scheduled to play live games on a given day. The users pay an entry fee to enter a contest and it is pooled in for distribution among the users ("**Entry Pool**") after deduction of a service/administrative fee by fantasy sports games providers. The users draft their teams based on their application of knowledge (gathered through systematic research), attention, experience and adroitness regarding the relevant sport. Based on the performance of the players selected by the user to draft his/her team, the user collects points. The users are ranked based on the points their selected players accumulate throughout the contest as per their on-field actions and scoring metrics for the contests.

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The Skill Element in Fantasy Sports Games: Global Perspective

There have been a few international cases wherein various courts have taken into account recent academic studies and legal precedents and held that fantasy sports games are games preponderantly of skill and not games of chance alone, subject to certain conditions.

The legality of online fantasy sports games in the U.S. is persuasively supported by *Humphrey v. Viacom*[8] (the "***Humphrey case***"). In the *Humphrey case*, the plaintiff had claimed that the registration fees paid by fantasy sports league participants constitute "wager" or "bets" and that the winners are determined predominantly by chance (due to potential player injuries and other chance circumstances). In dismissing the plaintiff's complaint, the district court held that fantasy sports are games of skill, depending on the fantasy participant's skill in selecting players for his or her team, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.

Data reported in the expert report prepared by Prof. Zvi Gilula has shown how statistical analysis suggests that fantasy sports games are games preponderantly based on skill.[9] The report focuses on the following key points to show that fantasy sports games are games of skill: (i) what the player (fantasy sports player) does has a direct effect on the contest results; (ii) statistics suggest how skilled, well-informed players are more likely to do better than non-skilled players within a set period of games; and (iii) over time, a player can get better and be more likely to win contests by applying analysis, skills and awareness of the games acquired by them.

Prof. Zvi Gilula's report observes that the participants in the fantasy sports games offered by companies like FandDuel and DraftKings (the two most prominent companies in the U.S. offering fantasy sports games) have large differences in win rates (i.e., proportion of contests won) averaged over time. To illustrate the import of this point, Prof. Gilula had generated a simple simulation exercise which showed that, the large observed differences in performance across DraftKings clients was consistent with some players persistently out-performing other players over time. The simulation exercise assumed that in each week, an "average performer" and a "top performer" participates in 10 guaranteed pool prize contests. On one hand, the probability of success (win rate) of the hypothetical average performer was found to be 19%. On the other hand, the probability of success (win rate) of the hypothetical top performer was found to be 47% for the same period. The large gap between the win rates of "average" users of DraftKings and top-performing users was statistically found to be both practically and statistically significant.

8 Humphrey v. Viacom, 2007 BL 38423 (D.N.J. 2007).
9 FanDuel v. Schneiderman, N.Y. Sup. Ct., 161691/2015 available at: http://www.legalsportsreport.com/wp-content/uploads/2015/11/DK-Oppn-to-PI.pdf.

The report argues that it is highly unlikely that the difference in average win rates between top performers and average performers can be explained solely by chance.

This is to say that, if we consider a person who was consistently winning fantasy sports games and has a good understanding of the game and pit them against either a person with little knowledge of fantasy sports games, or against a person who selects a random lineup, the player who is skilled and a consistent winner will be victorious most of the time. The ability to consistently find players who over-perform when compared to their salary value is a critical element denoting the skill involved in fantasy sports games.

The ability to consistently find players who over-perform when compared to their salary value is a critical element denoting the skill involved in fantasy sports.

The Skill Element in Fantasy Sports Games: Position in India

In 2015, the State of Nagaland introduced a licensed regime for skill games under Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2015 ("**Nagaland Gaming Legislation**"). Prior to the notification of the Nagaland Gaming Legislation, fantasy sports games were not expressly held to be a "game of skill" in any Indian legislation or judgment. The Nagaland Gaming Legislation expressly recognized, *inter alia*, "virtual sport fantasy league games" and "virtual team selection games" as skill games. However, in our view these games should satisfy the skill preponderance test that has been specified in the definition of the "Games of Skill" of the Nagaland Gaming Legislation.

In 2017, the High Court of Punjab and Haryana ("**P&H High Court**") became the first Indian court to rule a fantasy sports game to be a game predominantly based on skill.[10] The plaintiff in this matter was

10 Shri Varun Gumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017.

registered as a player on the platform Dream11.com, which was operated by the respondent company, Dream11 Fantasy Private Limited ("**Dream11**"). He lost while playing fantasy sports games tournaments offered on Dream11.com. The plaintiff moved the P&H High Court alleging that fantasy sports was not based on skill and that Dream11 was carrying on business covered within the definition of 'gambling' under the gambling legislation applicable to the state of Punjab.

The P&H High Court observed that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing.

The P&H High Court relied on the Supreme Court's decision in the *Lakshmanan case*. The P&H High Court observed that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing. The P&H High Court relied on the following arguments put forth by Dream11 adjudicating the fantasy sports game offered by Dream11 to be a 'game of skill'

A user, while drafting his fantasy team on Dream11, was required to:

- Pick a team consisting of at least as many players as required to constitute a real world team to score points for the duration of at least one entire real world match;
- Assess all the players available to make a team and evaluate the worth of a player against the other players keeping aside bias for an individual or a team;
- Based on knowledge and awareness of player's performance, evaluate a player's statistics;
- Adhere to an upper limit of spend to draft a team while ensuring that the team did not entirely/ substantially consist of players from a single real world team. This pre-condition also ensures that a user does not create a situation resembling the act of betting on the performance of a single team;
- Analyse the conditions of the other factors pertaining to the game, pitch, form of players, etc;
- Constantly monitor the scores of players drafted by a user.

An appeal was filed against the decision passed by the P&H High Court in this case and a two judge bench of the Supreme Court passed an order dismissing the appeal.[11] Thus, the P&H High Court order has reached finality in relation to the specific game format that was examined by the P&H High Court. Since the Supreme Court has given its confirmation to the order of the P&H High Court, the same could be construed as binding in all the Indian states with respect to specific game format analysed by the P&H High Court.

There are certain Indian states that do not provide specific exemptions for games of skill in their Gaming Legislations. However, it can be argued that those legislations in any case cannot apply to games of skill.

Conclusion

Based on what is set out above and the legal precedents, both internationally and in India, it can be persuasively argued that fantasy sports games are games in which success depends upon a substantial degree of skill. It is also pertinent to note that, not all fantasy sports games have been held to be games of skill. Various factors that a participant would need to assess keeping in mind the different conditions and scoring metrics set out for drafting a team affect the result of the fantasy sports game. Based on the reasoning of various courts, analysis of the conditions or the metrics within which a user is required to draft their team, viz., restrictions on the number of players from a single team, upper caps and limits, etc., plays a critical role in analyzing the element of skill involved in fantasy sports games. Hence, the gameplay of each fantasy sports game needs to be analysed on a case to case basis applying the principles discussed above.

11 Shri Varun Gumber v. Union Territory of Chandigarh and Ors., Supreme Court Order dated September 15, 2017, Supreme Court of India, Record of Proceedings, Diary No. 27511/2017.

Fantasy Sports Games in the Online Context

By Abhinav Shrivastava[1]

With technology creating new ways of transacting, rendering legacy and business practice in the offline space increasingly irrelevant[2], it raises the question of how law accommodates and regulates such transactions. Do we need new laws or can existing laws be taken online?

It is in order to address this concern that the principle of 'functional equivalence' comes into play. This principle is premised on the maintenance of expectations and relationships within the legal framework across media formats, and is thus intended to ensure that what holds in the offline media continues to hold in the online media[3]. While this principle enjoys wide application and is practically employed as a first step to accord recognition to online transactions, such recognition is typically circumscribed and qualified on account of insufficiencies in the translation of the offline analogue into the online transaction.

This article is concerned with the application of the principle to online gaming, and seeks to present a case for the regulatory treatment of online fantasy sports games at-par and as unqualified functional equivalents of offline fantasy sports games due to the nature of the (offline) fantasy sports games.

Fundamentals of Functional Equivalence

The principle of functional equivalence allows for technology-neutral policy and regulation formulation and the maintenance of continuity and consistency in the determination of legal relationships. This approach has been adopted to legitimise online click-wrap contracts[4] and act against defamatory[5] and obscene[6] content online. It also eases and clarifies juridical administration by avoiding the unappealing prospect of having multiple equivalent laws and regulations for each online transaction and jural relationship, akin to having a 'Law of the Horse' in Justice Easterbrook's estimation[7].

The principle of functional equivalence allows for technology-neutral policy and regulation formulation and the maintenance of continuity and consistency in the determination of legal relationships.

In application, the principle of functional equivalence is focussed on the functional and operational elements of the online transaction and regulates these transaction segments at par with analogous transactions in the offline space. Employing this premise, Parliament has sanctioned the recognition of electronic records as documentary records[8] and the higher judiciary has recognised the service of notices and summons through electronic means[9].

1 Abhinav Shrivastava is Senior Associate, LawNK.
2 Andreas Bubenzer-Paim, *Why No Industry is Safe from Tech Disruption*, (Nov. 7, 2017) https://www.forbes.com/sites/forbestechcouncil/2017/11/07/why-no-industry-is-safe-from-tech-disruption/#136577e630d3.
3 *See* Recommendation 22, *Global Information Networks: Realising Potential*, European Ministerial Conference, Switzerland, (Jul. 6-8, 1997) at 10.
4 Specht v. Netscape Communications Corp, 306 F.3d 17 (2d Cir., 2002) Register.com v. Verio, 356 F.3d 393 (2d Cir., 2004); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir., 1996).
5 Tata Sons Limited v. Greenpeace International & Anr., 178 (2011) DLT 705; Khawar Butt v. Asif Nazir Mir, CS (OS) No. 290 of 2010 (Del.).
6 Avnish Bajaj v. State of Delhi, (2005) 3 Comp LJ 364 Del.
7 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 University of Chicago Legal Forum 207 (1996), https://chicagounbound.uchicago.edu/cgi/.viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=2147&context=journal_articles.
8 Information Technology Act, 2000, §4; *See also* Indian Evidence Act, 1872, *amended by* Information Technology Act, 2000.
9 Central Electricity Regulatory Commission v. National Hydroelectric Power Corporation Limited, (2010) 10 SCC 280.

On the subject of gaming regulation, judicial precedents have employed tests and principles enunciated in the offline context, such as the dominant factor test and the unfair prize schemes test, on a functional equivalence basis to evaluate the game dynamics and operations of online and tele-operated games[10]. Equally, legislative and judicial authorities have treated an online game portal as a functional equivalent of the offline gaming house[11], and would thereby subject the online game operator to legal strictures and restrictions prescribed on an offline game organiser.

However, while the principle finds wide acceptance and application across online transactions, there is a marked hesitance to treat it as axiomatic due to inherent limitations in the online media, particularly on observance of physical conduct and personal identification. This has caused regulators and the judiciary to adopt a cautionary approach when confronted with online transactions, with recognition and equal treatment carrying heavy qualifications. For example, on account of the lack of identity authentication and receipt confirmation with email, the permissibility of service of summons through email is limited to instances where expediency requires overriding of the certification of service procedural norm[12] or where the identity and email linkage is reasonably established[13], with other instances of service of summons by email rendered as inadequate service.

In the realm of online gaming regulation, this cautionary approach has been exhibited as reservations being expressed with respect to the accurate translation of physical skills and lack of assurance against the breach and manipulation of the underlying game code. Most prominently, both the executive[14] and judiciary[15] have expressed such reservations in opining on the legality of online variants of games of skill in the physical space, with the Additional District Judge in *Gaussian Networks v. Ms. Monica Lakhanpal,*[16] ruling that all online variants of offline games constitute games of chance as (i) the degree of skills required in the physical form cannot be equated with games played online; and (ii) the online format enables manipulation of game dynamics.

Skills in Online Fantasy Sports Games

Fantasy sports games have been played offline for upwards of 50 years[17], and have been widely acknowledged as requiring participants to exercise their knowledge of players, performance history and statistics, and exercise skill in drafting and trading players to succeed[18].

In the course of participation in a fantasy sports game, a participant must first evaluate the relative worth of players available for drafting based on the prospective points tally likely to be generated when the player's performance is reduced to points as per the fantasy game operator's scoring criteria. This evaluation must also factor in the player's current performance history and trends, fitness level and injury record, history against a particular opposition and at a particular venue, environmental conditions and the player's performance history in particular conditions, along with other causative factors that are likely to influence the player's performance.

In the course of such evaluation and assessment, the participant must rely on his or her own accumulated knowledge from watching the sport along with the wealth of statistics available for past matches and must track the news to ascertain selection decisions and player fitness levels, and use this knowledge to develop a selection strategy that appropriately weighs these causative factors and determines the relative worth of

10 *See for reference* Bimalendu De v. Union of India, AIR 2001 Cal 30; Society of Catalysts v. Star Plus TV, Consumer Complaint No. 83 of 2007 (NCDR).
11 *See* §2(1)(b), Telangana Gaming (Amendment) Act, 2017; Gaussian Networks v. Ms. Monica Lakhanpal, Suit No. 32 of 2012, Delhi District Court (India).
12 Such as in matters requiring urgent relief or in commercial cases, where timely resolution is a key concern. *See* Central Electricity Regulatory Commission v. National Hydroelectric Power Corporation Limited, (2010) 10 SCC 280.
13 Such as service to an advocate-on-record's registered email account, *see* Supreme Court Rules, 2013, order LIII, rule 2.
14 Note the acknowledgement recorded in the order that the respondent (Director, Inspector General of Police) has not taken a decision on whether online rummy falls foul of the law or not. *See* Mahalakshmi Cultural Association v. Director Inspector General of Police, SLP (C) 15371 of 2012 (SC).
15 Gaussian Networks, *supra* note 11.
16 *Id*.
17 Rick Burton, Kevin Hall and Rodney Paul, *The Historical Development and Marketing of Fantasy Sports Leagues*, 2, 2 The Journal of Sport, Article 6 (2013).
18 *See* Background Note in Charles E. Humphrey, Jr v. Viacom Inc., No. 06-2768 DMC, 2007 W.L. 1797648 (D.N.J. Jun. 20, 2007); Shri Varun Gumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017.

the player as against other players available for selection. Throughout the course of this evaluation of player performance, participants have to be wary of confirmation bias and consciously avoid overrating players from a favoured team and conversely underrating players from a rival team.

With fantasy sports games that span a league or tournament, an additional avenue for the exhibition of skill is in the process of trading players. In such fantasy sports games, the participant is required to collect and evaluate statistics in each match to ascertain the relative worth from players from one match to the next in the tournament and track all matches without favour. Fantasy sports games also typically prescribe a cap on the number of substitutions permitted to a team across the tournament, thereby necessitating participants to study the tournament schedule and determine a strategy for selecting and dropping players across matches to ensure points accumulation across the entire tournament.

Fantasy sports games come in numerous variants with additional specifications and rules – typically game operators prescribe skill-set based minimums and maximums for team composition and a price cap for the virtual team, with some fantasy sports games also allowing for a captain designation with the captain's accumulated points being multiplied by a pre-set factor[19] or prescribe citizenship-based limitations and allowance for additional substitutions for junior/uncapped players[20].

19 *See* the Dream11 fantasy sports game format, accessible at: https://fantasycricket.dream11.com/in/.
20 *See* the Fandromeda fantasy sports game format offered in relation to the Indian Premier League, accessible at: https://fandromeda.com/.

With such variation across fantasy sports games, participants must apprise themselves with the rules and features of the relevant fantasy sports game, create strategies, and make selection decisions aligned with these rules and with the maximisation of the benefit provided by the additional features

The Punjab and Haryana High Court too recognised these variations while considering the Dream11 fantasy sports game in *Shri Varun Gumber v. Union Territory of Chandigarh and Ors.*,[21] noting that the Dream11 rules: (i) require the drafting of a virtual team consisting of at least as many players as constitute a real world team to score points for the duration of at least one entire real world match but (with an additional restriction of no more than 7 players being from the same real world team of 11 in the case of sports such as cricket and football), (ii) prescribe credit points for players and a maximum budget for the virtual team, (iii) restrict changes to the virtual team till 60 minutes prior to the match, and (iv) permit the selection of a captain and vice-captain whose points stand doubled and multiplied by 1.5 respectively, and opining that such variations and terms require participating users to employ greater skill in the course of participation.

Regulatory Treatment of Fantasy Sports Games

Going back to regulatory concerns with the functional equivalent treatment of online game formats, these concerns can be distilled and reduced to two principal reservations: (i) lack of translation and accounting of skills relying on physical effort and presence and (ii) lack of assurance of integrity and equal treatment of participants by the coded game environment[22].

These reservations have been expressed in the context of online variants of games such as snooker[23], which while acknowledged to be games of skill offline are materially reliant on physical elements such as influence of environmental factors on bounce, and the exhibition of physical skills such as controlling the force through subtle touch, placement and angling of a shot.

Accordingly, the exclusion of the physical environment and presence and the replacement of the physical deck and game pieces with software coded counterparts can be expected to raise the expressed reservations on operative equivalence of the offline game by the online game. Thus, the favoured approach to the evaluation of an online format appears to be to treat it as a new game format requiring independent evaluation of the influence of skill and chance in the determination of a winning outcome and not as a direct equivalent of the offline game of skill format entitling automatic recognition as a game of skill[24].

The exhibition of skill in both offline and online fantasy sports games is entirely based around the knowledge and acumen of the participant, with no part of such skill exhibition relying on physical effort or requiring observance of physical conduct.

However, do fantasy sports merit the same dichotomous treatment as these game formats? In contrast to games such as snooker and card games, fantasy sports games do not rely on physical pieces for play nor do they rely on the expending of physical effort; in functional terms, the game dynamics of offline fantasy sports remain undiluted and unchanged when the game moves from the offline to the online medium. The online variant of offline fantasy sports only changes the media format of delivery and not the fundamental premise of the game itself, and thus acts as a lossless translation of the offline game into an online game.

21 Shri Varun Gumber, *supra* note 18.
22 See reservations expressed in Gaussian Networks, *supra* note 11.
23 Gaussian Networks, *supra* note 11.
24 *See* Mahalakshmi Cultural Association, *supra* note 14, where online rummy was considered distinct and distinguishable from offline rummy on the matter of legal treatment.

The exhibition of skill in both offline and online fantasy sports games is entirely based around the knowledge and acumen of the participant, with no part of such skill exhibition relying on physical effort or requiring observance of physical conduct.

Online fantasy sports games merit consideration as unqualified functional equivalents of offline fantasy sports games and thereby warrant assessment as games of skill at-par with their offline analogues.

Additionally, offline fantasy sports games neither employ physical playing pieces nor do they need a physical game environment, as fantasy sports games are premised on the accumulation of points which accrue to virtual counterparts of real-world athletes based on the real world athlete's performance in a real-world event. The point accrual methodology is pre-declared and the performance statistics of the underlying athlete are independently generated and verifiable. Such probity and independent verifiability of points accumulation and tabulation leaves no room for tinkering with the game code of the online fantasy sports offering to fix the winning outcome.

On account of such seamless translation of game dynamics from offline fantasy to online fantasy, the reservations expressed on the regulatory treatment of online variants have limited application when considering the legal treatment of online fantasy and, therefore, any dichotomy in the legal treatment of offline and online variants is not warranted.

Such seamless and lossless translatability from the offline to the online makes online fantasy sports games an appropriate game format for regulatory treatment at-par with offline fantasy sports games, thus entitling them to the benefit of regulatory practice and assessments of offline fantasy sports games[25] on the matter of the influence of skill and chance in the determining of the winning outcome of the game.

Accordingly, online fantasy sports games merit consideration as unqualified functional equivalents of offline fantasy sports games and thereby warrant assessment as games of skill at-par with their offline analogues. Additionally, the lack of any influence of the physical environment in the gameplay of fantasy sports games makes them distinct and distinguishable from other offline games of skill, such as rummy, and thus reservations expressed with the functional equivalent treatment of online variants of these games are inappropriate for consideration with online fantasy sports games. On the basis of the above, uniform treatment of fantasy sports games is warranted regardless of the media used to facilitate gameplay.

25 See Senator Richard Bryan's and Senator Jon Kyl's submissions and the history of the carve-out for fantasy sports in the Unlawful Internet Gambling Enforcement Act of 2006, in Ryan Rodenburg, *The True Congressional Origin of Daily Fantasy Sports*, Sony ESPN, http://www.espn.in/chalk/story/_/id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress.

Paid Fantasy Sports Games – Recent Developments Under Indian Law

By Nandan Kamath[1] and R. Seshank Shekar[2]

Introduction

The origin of fantasy sports games can be traced to the United States of America (USA), where there are accounts of offline fantasy sports games being played in relation to golf and baseball as early as the 1950s[3]. Over the course of subsequent decades, fantasy sports games slowly gained in popularity and spread across various other sports including basketball, American football and football/soccer[4]. The advent of the internet and the dot com boom over the turn of the millennium provided a pervasive and networked platform for operators to tap into a far larger user base than was accessible previously and fuelled the popularity of fantasy sports games, particularly online variants, to unprecedented heights. Fantasy sports games are now more popular than ever and they exist for nearly any organised team sport and several individual sports as well. Studies have revealed that nearly 5% of the population of the United Kingdom[5] (UK) and 21% of the population of the USA[6] play fantasy sports games in one form or another.

The popularity of fantasy sports games has also increased exponentially in India over the last half decade. In its earliest avatar, the fantasy sports games sector was almost exclusively restricted to cricket and contests were conventionally offered in relation to specific tournaments or leagues on a free-to-play basis. However, budding fantasy managers across the country can now select and manage virtual fantasy teams in fantasy sports games in sports such as football, basketball and even kabaddi on not only a free-to-play, but also a pay-to-play basis as well. The introduction of pay-to-play fantasy sports games, i.e., fantasy sports games which can be played for cash and with real money prizes on offer, has given rise to the question whether such fantasy sports games are lawful to offer under the laws of India.

This specific issue was recently considered by the Punjab and Haryana High Court ("**P&H High Court**") in the case of *Shri Varun Gumber v. Union Territory of Chandigarh and Ors.* (the "***Varun Gumber case***")[7]. In what is a landmark ruling for fantasy sports games in India, the P&H High Court, *inter alia*, held that the fantasy sports games being offered by the fantasy sports games operator that was a party to that case were 'games of skill' under Indian law and did not constitute gambling. Significantly, the Court also recognised the offering of fantasy sports games as a legitimate business activity protected under the Constitution of India.

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1 Nandan Kamath is Principal Lawyer, LawNK.
2 R. Seshank Shekar is Senior Associate, LawNK.
3 Corinne Green, *'Wink': Wilfred 'Bill' Winkenbach invented Fantasy Football Way Back in 1962 with GOPPPL*, Oakland NewsNet5 (Sept 11, 2014), https://web.archive.org/web/20150929163914/http://www.newsnet5.com/sports/wink-wilfred-bill-winkenbach-invented-fantasy-football-way-back-in-1962-with-gopppl-in-oakland.
4 Hugo Greenhalg, *Meet the Man behind Bringing Fantasy Football to the UK*, Financial Times (Sept. 1, 2017), https://www.ft.com/content/8dbc85cc-7eb0-11e7-ab01-a13271d1ee9c.
5 Marc Saba, *There's a Perfect Storm Brewing For European Daily Fantasy Sports*, Legal Sports Report (Jun. 26, 2015), https://www.legalsportsreport.com/1966/european-daily-fantasy-sports-growth/.
6 *Industry Demographics*, Fantasy Sports Trade Association, https://fsta.org/research/industry-demographics/.
7 C.W.P. No. 7559 of 2017.

This article seeks to examine the implications of this ruling on the status of fantasy sports games in India with a particular focus on how the ruling impacts the structure and operations of operators offering paid fantasy sports games operators. To this end, the article discusses the development of gaming law precedent relating to the offering of paid games of skill and the legal relevance of the *Varun Gumber case*.

Paid Games Of Skill – Background

Until recently, Indian jurisprudence concerning gaming and gambling was primarily focused on offline games or activities or conventional games, such as rummy[8]. This is partly due to the fact that the primary central legislation concerning gambling, the Public Gambling Act, 1867 ("**PGA**") and most state gambling legislations, with a few exceptions such as Nagaland[9] and Sikkim[10], have not contemplated online gaming specifically in their legislations. Online gaming operators, including fantasy sports games operators, have thus been reliant on the broad principles laid down in these legislations and precedents, and applied them in the online scenario to structure their games and their business operations.

The PGA, which was enacted during colonial rule and is still in effect today, criminalises the act of gambling in a public forum[11] and the keeping of a 'common gaming house',[12] i.e., any enclosed space, in which instruments of gaming are kept or used for profit or gain. Significantly however, Section 12 of the PGA provides that the provisions of the PGA do not apply to a 'game of mere skill' wherever played. Thus, while the PGA effectively prohibits organised gambling in India, it creates a distinction between betting on 'games of chance' and 'games of skill'.

Precedent has settled the principle that a 'game of mere skill' is a game that passes the 'dominant factor test' or 'predominance test', i.e., wherein skill predominates over chance in determining the outcome.

Precedent has settled the principle that a 'game of mere skill' is a game that passes the 'dominant factor test' or 'predominance test', i.e., wherein skill predominates over chance in determining the outcome. The Indian courts have demonstrated a willingness to evaluate the dynamics of various games in detail in determining whether such games constitute games of skill. In the process, they have recognised games such as rummy[13], bridge[14] and betting on horse racing[15] as games of skill.

To the authors' knowledge, the *Varun Gumber case* is the first known case in India wherein a court evaluated the legality of fantasy sports games. In this case, the petitioner, Varun Gumber ("**Petitioner**"), filed a writ petition in the P&H High Court, alleging that he had lost a cumulative amount of Rs. 50,000/- while participating in various paid fantasy sports games contests made available on Dream11.com. The Petitioner claimed that he had participated in fantasy sports game contests on the platform and that it was only after participating in such contests that he apparently 'realised' that the contests being offered on Dream11.com were not based on any skill and that to his understanding the offering on Dream11.com was "purely a game of chance" and thus amounted to gambling. The Petitioner filed a writ petition in the P&H High Court along these lines. In its order, the P&H High Court examined the terms and conditions, game rules and the format of the fantasy sports games contests offered on Dream11.com and rejected the Petitioner's contentions *in toto*. The P&H High Court found that 'the element of skill' had a predominant influence on the outcome of the fantasy sports games being offered on Dream11.com and adjudged the fantasy sports game being

8 State of Andhra Pradesh v. K. Satyanarayana, AIR. 1968 SC 825.
9 The Nagaland Online Games of Skill Act, 2017.
10 The Sikkim Online Gaming (Regulation) Act, 2008.
11 The Public Gambling Act, 1867, § 4.
12 The Public Gambling Act, 1867, § 1.
13 State of Andhra Pradesh, *supra* note 8.
14 *Id.*
15 K.R. Lakshmanan v. State of Tamil Nadu, AIR. 1996 SC 1153.

offered by Dream11.com, which involved users having to select a team consisting of at least as many players as constitute a real world team to score points for the duration of at least one entire real world match. The P&H High Court adjudged the fantasy sports game being offered by Dream11.com in this format to be a "game of mere skill" and thus not falling within the activity of gambling for the purposes of the PGA. This finding was based on a number of factors that have been discussed in a preceding article in this publication.

In light of the ruling of the P&H High Court in the *Varun Gumber case* and various other precedents[16], it is legal to offer and play paid fantasy sports games in most Indian states, with the only relevant criterion being that the particular fantasy sports game qualifies as a 'game of skill'.

In light of the ruling of the P&H High Court in the Varun Gumber case and various other precedents , it is legal to offer and play paid fantasy sports games in most Indian states, with the only relevant criterion being that the particular fantasy sports game qualifies as a 'game of skill'.

There has been lingering uncertainty regarding the legality of the business and revenue models that can be adopted by paid fantasy sports games and other paid games of skill operators. This uncertainty stems from the ruling of the Supreme Court of India (the "**Supreme Court**") in the landmark case of *State of Andhra Pradesh v. K. Satyanarayana*[17] (the "***Satyanarayana case***") which appeared to establish a two-pronged evaluation to determine whether a particular game could be considered gambling or not. In the *Satyanarayana case*, the Supreme Court was concerned with determining if the card game 'rummy' constituted a 'game of skill' or a 'game of chance'. In the course of such determination, the Supreme Court stated that, to determine whether an activity falls outside the scope of gambling it must be determined whether the game is "mainly and preponderantly a game of skill" and further suggested that it may also be pertinent to understand whether the operator of the game is making "a profit or gain" from any game "played for stakes", i.e., anything more than nominal charges levied on users to defray the operator's expenses.

In its ruling, the Supreme Court, *inter alia*, observed that clubs usually charge an additional amount for anything they supply to their members. In addition, it observed that merely charging an extra fee for playing cards (unless excessive) will not amount to the club making a profit or gain so as to render the club a common gaming house.

16 Lakshmanan *supra* note 15; D. Krishna Kumar v. State of A.P. 2003 Cri. L.J. 143.
17 A.I.R. 1968 S.C. 825.

The Supreme Court held that charges for supply of cards, sitting fee for all persons playing in the club, as well as late fee, were essential for the maintenance of the club. These were pre-determined amounts that did not depend on, or constitute a percentage of, the total stakes put up by game participants.

The *Satyanarayana case* seems to suggest that operators of games of skill must not make profits from offering their games as this would somehow risk a characterisation as gambling, even though the nature of the underlying game remains a game of skill. As unusual as the aforesaid logic of the *Satyanarayana case* is, there have been a few other instances in which this type of reasoning has been used.

In *The Director General of Police v. Mahalakshmi Cultural Association*[18] (the "***Mahalakshmi case***"), which related to the raid of a gambling club by the Madras police, the Madras High Court had, in its order, held that rummy (recognised as a game of skill), when played for stakes would amount to gambling. The matter was subsequently heard by the Supreme Court by way of a Special Leave Petition filed by the Mahalakshmi Cultural Association (the "**Association**") and this Special Leave Petition (SLP) was accompanied by several intervention applications filed by online rummy operators, who were apprehensive that the Madras High Court order would apply to their online gaming activities as well.[19] The SLP and the intervention applications were eventually disposed of by the Supreme Court through two separate orders. With respect to the applications filed by the rummy operators, the Court observed that the Madras High Court order did not deal with online rummy or online rummy operators and that it was applicable to brick and mortar establishments only. With respect to the SLP, the counsel for the Association sought permission to withdraw the original writ filed before the Madras High Court and such permission was granted by the Supreme Court, as it was found that the prosecution did not allege that the members of the Association were playing rummy but that they were playing a popular local game instead for stakes. In dismissing the SLP, the Supreme Court observed that since the writ petition was withdrawn and dismissed, the observations made by the Madras High Court in its order did not survive. The effect of this dismissal is that the observations made by the Madras High Court with respect to playing rummy for stakes do not constitute law.

In *Gaussian Network Pvt. Ltd. v. Ms. Monica Lakhanpal* (the "***Gaussian case***")[20], Gaussian Network Pvt. Ltd. ("**Gaussian**"), which was the owner and operator of a popular gaming site, approached the Delhi District Court

18 2012 3 Mad. L.J. 561.

19 Special Leave to Appeal (C) Nos. 15371 of 2012 (India) (arising out of impugned final judgment and order in W.A. No. 2287 of 2011 passed by the High Court of Madras).

20 M/s. Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal and State of NCT, Suit No. 32 of 2012, Delhi District Court.

with a petition filed under Order 36, Rule 1, of the Code of Civil Procedure[21] (CPC) and sought the opinion of the Court on several issues relating to games of skills. This included whether there was any restriction in Gaussian allowing users of its platform to play games of skill for stakes, with the intention of making profit. In its ruling, the Court observed that online games of skill are outside the scope of trade and commerce and thus do not have the protection offered under Article 19(1)(g) of the Constitution of India, which guarantees freedom of trade, profession and business. The Court had seemingly ignored or disregarded the exception granted to games of skill in legislations and as re-affirmed in various judgements. However, as this was an order made in a petition filed under Order 36, Rule 1, the order was binding only on the parties to the petition. The District Court order was challenged by Gaussian in the Delhi High Court through a Civil Revision Petition. Eventually however, Gaussian sought permission from the Delhi High Court to withdraw the petition, which permission was duly granted. Thus, the observations made in relation to games of skill remain as judicial observations only.

In the recent case of *Dominance Games Pvt. Ltd. & Ors.* v. *State of Gujarat*[22], a single judge of the Gujarat High Court also took a view similar to that of the Delhi District Court in the *Gaussian Case* and held that in the context of poker, a game, "*even it [sic] is a game of skill but played with stakes, may be considered as gambling*". This judgement has been appealed and is currently being heard by a Division Bench in the Gujarat High Court.

On the other hand, there have been multiple judgements[23] since the *Satyanarayana case* that have not relied on or even referred to the restriction on profit making activity specified therein. These judgments have treated the *Satyanarayana case's* suggestion – that an evaluation must be undertaken of whether the operator is making a profit or gain from a gaming activity – as merely *obiter dicta*, i.e., not a relevant or operative part of the judgement, but just a passing reference or observation. Indeed, such an interpretation of the *Satyanarayana case* appears to be logical. On the face of it, the prong requiring courts to assess whether the game operator or conductor is making a profit appears to be in direct contravention of the exceptions granted to games of skill under the PGA and most state legislations. On the one hand, the PGA and similar state statutes explicitly and completely exempt games of skill from their ambit, and on the other hand, the Supreme Court decision in the *Satyanarayana case* appears to be a judicial attempt to rein in the profit-making ability of the operator of such a game and place bounds (that are not found in the underlying legislation) on the operator's business and operating model. If games of skill are indeed outside the purview of gambling legislation, then it logically follows that any person operating a game of skill may profit from such operation without any additional constraint. Once the assessment of the 'predominant skill' component is complete, the business model or operating structure under which it is offered to the public ought to be irrelevant and extraneous to the legal analysis.[24]

Once the assessment of the 'predominant skill' component is complete, the business model or operating structure under which it is offered to the public ought to be irrelevant and extraneous to the legal analysis.

The Varun Gumber Case – Implications

In the realm of paid fantasy sports games, the issue of whether a gaming operator can make profit from offering a game came up, albeit indirectly, in the recent *Varun Gumber case*. While ruling that the fantasy sports games offered on Dream11.com qualified as games of 'mere skill', the P&H High Court held that the offering of fantasy sports games on Dream11.com was a legitimate business activity and would be granted protection under Article 19(1)(g) of the Constitution of India. In its ruling, the Court also observed that the

21 Code of Civil Procedure, 1908, order 36, rule 1. This rule provides that parties claiming to be interested in the decision of any question of fact or law may mutually agree to approach the court for a determination.
22 Special Civil Application No. 6903 of 2017.
23 Lakshmanan *supra* note 14, Kumar *supra* note 16.
24 *Games of Skill in India - A Proposal For Reform*, The Sports Law and Policy Centre (Mar. 2017), https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view.

operator had been regularly paying service tax and income tax and was duly registered as an incorporated entity with the Registrar of Companies and that none of these authorities had found anything amiss in its business model.

By considering the offering of fantasy sports games as a legitimate business, deeming it unnecessary to evaluate the business model under which the game was offered and whether or not the operator was making profit, and by explicitly extending the protection of Article 19(1)(g) to such activities, the P&H High Court has effectively disregarded the limitation on profit-making described above. This was in the course of evaluating the legality of the Dream11 game, which has been held to not constitute gambling activity simply and solely as a result of judicial recognition as a 'game of mere skill'.

The order of the P&H High Court in the *Varun Gumber case* was referred to the Supreme Court through a Special Leave Petition. However, the petition was dismissed in the Supreme Court[25]. This means the P&H High Court's ruling stands and will have significant persuasive value in High Courts and lower courts that are tasked with deliberating on and evaluating similar matters across the country.

From the perspective of paid fantasy sports games, the *Varun Gumber case* is an encouraging sign. It demonstrates that the judiciary is willing to carefully evaluate the structure of fantasy sports games for satisfaction of 'game of skill' criteria, and moreover, that courts are not bound to place restrictions on the business flexibility of fantasy sports games operators and their ability and right to profit from their legitimate business activities.

Historically, the absence of conclusive precedent on the legality of charging users for their participation in a game of skill in India has been deeply problematic from an operational perspective. This has limited the prospects and potential growth of the gaming industry due to the 'chilling effect' it has created on new businesses and investments, and on the expansion and growth of existing ones. In this regard, the *Varun Gumber* case is a development in a positive direction and provides a rather bright ray of hope for the 'game of skill' industry in general, and the fantasy sports games industry in particular.

25 Shri Varun Gumber v. Union Territory of Chandigarh and Ors., Supreme Court order dated September 15, 2017, Supreme Court of India, Record of Proceedings, diary no. 27511/2017.

Use of Third Party Intellectual Property in Fantasy Sports Games

By Arun Prabhu and Rishabh Shroff[1]

Fantasy sports games are, at their core, a means to make real life sportspersons ("**Player(s)**") compete on imaginary playing fields. From its origin as an informal baseball fan league evolved in a rotisserie diner in Manhattan, fantasy sports games today increasingly lean on reality, particularly in light of increased popularity of the sports and Players, their immense fan following, and instantaneous sporting updates. Through the advent of the internet, gaming websites and mobile gaming applications, fantasy sports have retained a tether to reality.

Through the advent of the internet, gaming websites and mobile gaming applications, fantasy sports have retained a tether to reality.

Typically, this connection of fantasy sports games to reality lies in factual information like current and historical scores, results, statistics and performance metrics ("**Facts**") as well as in the Player and team names, logos, nicknames, images, models, personae, likenesses, characters or other descriptive information pertaining to Players and their teams ("**Identity**").

1 Arun Prabhu and Rishabh Shroff are Partners at Cyril Amarchand Mangaldas. The authors would like to acknowledge the contributions of Pooja Sable, Abhilasha Malpani, Kruthi Venkatesh, Divya Don Bosco and Shraddha Suryavanshi who assisted with this paper.

The use of Facts and Identity in fantasy sports games not only affects the marketability of the game to its participants ("**Participants**") but is also the essence of the existence and operation of fantasy sports games. However, Facts and Identity are also valuable to various stakeholders in sports including Players, their teams, owners, leagues, broadcasters, merchandizers and advertisers ("**Proprietors**"). Players as well as leagues invest significant time and skill in gaining recognition and popularity. What they own is intangible yet extremely valuable and generates much of the public interest in sports and Players themselves. As a result, the market for sports-related products and services continues to expand. The celebrated status of Players and popularity of leagues provides tremendous commercial opportunities. In order to maximize the profit and prevent free-riding, the commercial use of Facts and Identity is tightly controlled by Proprietors.

Unfortunately, for operators of fantasy sports games, the usage of Facts and Identity involves negotiating the complexities of the frequently litigated and ever-evolving law governing intellectual property ("**IP**") rights.

While their popularity worldwide is well known, fantasy sports games in India have gained traction in parallel with the growing popularity of their real life counterparts and increasing digitization. As a result, major league operators like the Board of Control for Cricket in India have launched their own fantasy sports games platforms.[2]

The tug of war for the right to monetize Facts and Identity between Proprietors and fantasy sports games operators is seldom an equal one. As seen in the past, an increase in license fees by Major League Baseball by an outrageous $1,975,000 in less than a year,[3] and a warning by National Football League about restricting fantasy licenses severely and greatly increasing the fees involved with fantasy football[4] are symptomatic of this dispute.

It is imperative to understand whether use of such Facts and Identities by fantasy sports game operators constitutes violation of IP law and the extent to which use is permitted sans licensing.

At the heart of this dispute lies the question of whether Facts and Identities are the IP of the Proprietors and whether the nature of usage by fantasy sports games operator constitutes an infringement of the rights of the Proprietors.

Thus, it is imperative to understand whether use of such Facts and Identities by fantasy sports game operators constitutes violation of IP law and the extent to which use is permitted *sans* licensing. This paper seeks to analyse the interplay of applicable IP regime and the operation of fantasy sports games in India.

For purposes of brevity, this article discusses the position of law in India and other jurisdictions in relation to use of Facts, including statistics and the use of names and logos in Parts I and II (respectively) of this article and the position of law in relation to use of Player Identity, including use of images, in Part III of this article.

Part I - Use of Statistics

Statistics or Facts have been of existential importance to the operation of fantasy sports games since their origin.[5] These Facts are obtained by fantasy sports game operators from various sources, including publicly available information, and displayed alongside the name and image of the Players available for a fantasy sports game on the fantasy sports game operator's platform. The issue arising from use of such Facts is that the fantasy sports game operators may invite a copyright infringement claim from the Proprietor of such Facts. Thus, the determination of copyrightability of Facts becomes crucial. We have discussed below the foregoing issue in light of the applicable laws and judicial rulings in India and other jurisdictions, mainly the United States of America (US).

2 Sharon Fernandes, *Where everyone is a team manager*, Times of India, (Dec. 13, 2015), https://timesofindia.indiatimes.com/india/Where-everyone-is-a-team-manager/articleshow/50156569.cms.
3 Kurt Badenhausen, *Foul Ball*, Forbes, (Feb. 27, 2006) https://www.forbes.com/forbes/2006/0227/052.html#2e173d171261.
4 Bill King, *A Real Fight over Fantasy*, Street & Smith's Sports Bus. J., Nov. 14-20, 2005, at 16.
5 Zachary Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 Ohio State L.J. 911, 916-919 (2006).

Statistics and Copyright Law

Statistics, Constituents of Copyrightable Work, Use of Statistics - Position in India

The Indian Copyright Act, 1957 ("**Copyright Act**") protects original literary, musical, artistic and dramatic work as well as rights of broadcasters and performers from exploitation by others. In order to be protected under the Copyright Act, statistics must qualify as 'original' 'literary' work.[6] 'Literary' works have been defined under the Copyright Act to include computer programmes, tables and compilations.[7] This is an inclusive definition and not exhaustive and could include any literary writing or content. 'Originality' as a concept under copyright law does not require that an idea used by a person must be original, but that the expression of the thoughts by a person must be original and not a copy of another author.[8]

It is a well-accepted principle of copyright law that facts in themselves are not copyrightable. It has been held in *EBC v. DB Modak*, that there exists no copyright in facts, and that only a creation of work using skill, labour, and capital that is more than a copy of an original work is copyrightable.[9]

It is a well-accepted principle of copyright law that facts in themselves are not copyrightable

It is also relevant to mention here that the Copyright Act affords protection to 'compilations', which are considered to be 'literary' copyrightable works. While the Copyright Act does not define the term 'compilation', it has been defined under the US Copyright Act, 1976 which states that a 'compilation' is a "work formed by the collection and assembly of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." It is likely that a fantasy sports game operator's use or copying of any Proprietor's (such as a broadcaster's) compilation of statistics, prepared after having expending substantial labour and resources to collect, compile and distribute game statistics in a sufficiently original and creative selection[10] and arrangement, may invite a claim of copyright infringement.

6 The Copyright Act, 1957, §13.
7 The Copyright Act, 1957, §2(o).
8 Ladbroke (Football) Limited v. William Hill (Football) Limited, [1964] 1 All ER at 465 (Eng.).
9 Eastern Book Company and Ors. v. DB Modak and Anr., (2008) 1 SCC 1, at ¶8.
10 Case C-604/10, Football Dataco Limited v. Yahoo! UK Limited, 2012 E.C.D.R. ("Football Dataco").

In applying the above position of law to the use of Facts in fantasy sports, it is clear that for statistics to qualify as copyrightable literary works, they should be an original expression of thoughts or ideas. Statistics, being facts, would not be copyrightable, and fantasy sports game operators may use the same without being sued successfully in a copyright infringement claim. However, a direct copy of a compilation of statistics may be in violation of copyright of the author of such compilation.

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Statistics, Constituents of Copyrightable Work, Use of Statistics - Position in Other Jurisdictions

The position on copyright protection is similar in the US and other foreign jurisdictions, including the European Union (**EU**)[11]. The US Copyright Act, 1976 affords protection to 'original' works of 'authorship' fixed in any tangible medium of expression. Works of authorship, like in India, include literary, musical, dramatic, architectural, pictorial/graphic works as well as sound recordings and motion pictures. Copyright in no way extends to any idea, procedure, process, system or method of operation.

Similar decisions as cited in the Indian context have been observed in the US with respect to copyright protection in the context of fantasy sports games and reproduction of sports updates. The issue of copyright protection for game statistics was addressed in *National Basketball Association v. Motorola*.[12] Motorola had been selling and marketing handheld pagers marketed as 'Sportstrax' which displayed updated information of professional basketball games in progress in two- to three-minute intervals and Sports Team Analysis and Tracking Systems had been operating the America On-Line website providing slightly more comprehensive and real time game information. The National Basketball Association (NBA) claimed relief citing *inter alia* copyright infringement and unfair competition. The Court held that although broadcasts are protected under copyright law, Motorola's reproduction of facts from the broadcasts did not infringe NBA's copyright.[13] The Court in this case has primarily placed reliance upon *Feist Publications v. Rural Telephone Service Co.*[14] which discussed the fact and expression dichotomy, and held that it is only the expression and not facts that may be worthy of copyright protection. It affirmed the need for a minimum amount (modicum) of creativity in a work for it to be granted copyright protection. The case addressed that despite an original authorship in a work, the underlying facts and ideas can be used so long as they do not feature in the same selection and arrangement. This mirrors the position of copyright law in India as set out above.

With regard to compilations, the US Second Circuit Court of Appeal held that copyright can be claimed in the compilation of statistics, and a copy of a work in the exact same format without any addition on part of the reproducer has been held to be an infringement.[15] The European Court of Justice, in *Football Dataco Ltd. v. Yahoo! UK Limited*, also granted similar protection to databases that were "original intellectual creations", irrespective of whether the underlying content were entitled to copyright protection.[16]

Copyright, Facts and the Hot News Doctrine

Developed in 1918 by the US Supreme Court in *International News Service v. Associated Press*, 'hot news' refers to written material or the live televised events, often "facts," that have value for a short duration, and which will soon move into the "public realm" losing their value.[17] It, therefore, protects the commercial value of time-sensitive information.

11 Case C-5/08, Infopaq International A/S v. Danske Dagblades Forening, 2009 E.C.R. I-06569.
12 National Basketball Association v. Motorola Inc., 105 F.3d 841 (2nd Cir. 1997).
13 *Id.*, at ¶¶ 32-33.
14 Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) ("Feist").
15 Kregos v. Associated Press, 927 F.2d 700 (2d Cir. 1991).
16 Football Dataco, *supra* note 10.
17 International News Service v. Associated Press, 248 U.S. 215 (1918) ("INS").

The Delhi High Court in *Star India Private Limited v. Piyush Agarwal*,[18] had applied the 'hot news doctrine' so established in *INS*[19] to state that ball-by-ball updates in a sport constituted time-sensitive information with potential commercial value. In the case, the Court held that Star India had contractually secured paramount rights to such information under an exclusive media rights agreement, and only Star India was to be allowed to take advantage of these updates for at least fifteen (15) minutes from the moment such updates were broadcasted by Star India.

The Delhi High Court in Star India Private Limited v. Piyush Agarwal, had applied the 'hot news doctrine' so established in INS to state that ball-by-ball updates in a sport constituted time-sensitive information with potential commercial value.

This decision was challenged before the division bench of the Delhi High Court in *Akuate Internet Services Private Limited v. Star India Private Limited*.[20] The division bench rejected the rights claimed by Star India to prevent others from publishing or sharing match-information or facts arguing violation of broadcasting rights on the basis of the hot news doctrine, the tort of unfair competition and the principle of unjust enrichment.

The bench reiterated that match information, which essentially comprises facts, does not *per se* have any protection under the Copyright Act. Therefore, any protection to statistics, including under tort law, was precluded by virtue of Section 16 of the Copyright Act which states that no copyright will vest in anything that does not have protection under the provisions of the Copyright Act. Further, the bench disregarded the applicability of the hot news doctrine to match information and statistics, and held that the fact or information passes into public domain upon its occurrence for the live audience, and upon broadcast for all others, and no proprietary rights can be claimed in it, irrespective of the fact that the person is reproducing this information for commercial gain or otherwise.[21]

The above Delhi High Court decision appears to clarify the position that there exists no copyright in statistics of a cricket game. A similar decision was delivered by the Delhi High Court in 2012 wherein the Court held that once match scores have already entered the public domain, they can be freely reproduced without infringing a copyright.[22]

Given the position of law in India as well as the US, it can be concluded that dispute over copyrightability of statistics or Facts is well settled. Statistics are not copyrightable as they are merely 'facts' and in cases of compilation, a case for copyright infringement can only be made if such statistical compilations are reproduced in the exact same format. The legal and factual position works out well in favour of fantasy sports game operators as the fantasy sports games format does not involve a direct copy of real time statistics compiled by any entity. Statistics ultimately used by fantasy sports game operators as 'fantasy points' are arrived at by use of scores, which are factual occurrences used by fantasy sports game operators only as 'raw data' to compile fantasy points and therefore, are not a copy of compilations made by any person. Therefore, such use of statistics would not lead to copyright infringement.

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18 Star India Private Limited v. Piyush Agarwal, 2013 SCC Online Del 1030.
19 INS, *supra* note 16.
20 Akuate Internet Services Private Limited v. Star India Private Limited, 2013 SCC Online Del 3344.
21 *Id.*, at ¶56.
22 ICC Development v. New Delhi Television Ltd., (2012) 193 DLT 279.

Part II - Use of Logos and Names of Teams, Leagues and Players

The rapid growth of the sports broadcasting and merchandising industries has led to Players and leagues acquiring, ascribing greater value to, and more robustly protecting the names of Players, leagues, teams and logos. The extent of this protection is slowly extending to fixtures[23], colours,[24] patterns, uniform designs, etc. For example, Wimbledon has acquired a trademark over their colour scheme of green and purple stripes, and this colour mark extends to usage on tennis sportswear as well. [25] Correspondingly, the need to use registered trademarks has become increasingly acute for fantasy sports game operators.

We have discussed below the use of logos, team names and Player names by fantasy sports game operators in the context of trademark law in India and other foreign jurisdictions. Similarly, we have also discussed the publicity rights of the Players.

Names, Logos and Trademark Law

Use of Names, Logos and Trademark Infringement - Position in India

Typically, fantasy sports game operators in India use names of Players, team logos and team names to enable the Participants to choose Players, teams and games.

The Trade Marks Act, 1999 ("**Trademarks Act**") states *inter alia* that a registered trademark is infringed when a person, (i) not being a registered proprietor or a permitted user (ii) uses in the course of trade a mark which is identical or similar or deceptively similar trade mark in relation to the goods or services in respect of which the trade mark is registered (iii) and in such manner as to render the use of the mark likely to be taken as being used as a trademark.

To bring a claim of trademark infringement, apart from proving the use of identical or similar trademark in the course of trade, it is essential to prove that use of such mark is likely to be taken as a trademark.[26] In other words, the use of a registered trademark would constitute an infringement only if it indicates a connection in the course of trade between the person and his goods or services, irrespective of his intention.[27]

To prove infringement, deception should be such that the public would assume that the mark is indicative of the same being a trademark of a registered proprietor.[28] In general, a mere usage of a trade mark by a third party would not, *ipso facto*, amount to infringement if such person uses the trade mark in relation to an entirely different set of goods or services.[29]

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Apart from the case of traditional trademark infringement, another remedy that lies with the owner of trademark in cases where mark used is identical and is being used in dealing with dissimilar goods, is under Section 29(4) of Trademarks Act.[30] It provides that a trademark may also

23 *See* EL CLASICO, LIGA NACIONAL DE FÚTBOL PROFESIONAL, Registration No. 87335003, https://trademarks.justia.com/873/35/el-87335003.html.
24 B. Emerson & M. Spink, *United States: Collegiate Color Trademarks: Not a Pigment of Your Imagination*, (Mar. 18, 2015), http://www.mondaq.com/unitedstates/x/382050/Trademark/Collegiate+Color+Trademarks+Not+A+Pigment+Of+Your+Imagination
25 Sean Cottrell & Chris Bond, *Wimbledon Secured a Color Mark for the Green and Purple*, (Jul. 6, 2017) https://www.lawinsport.com/topics/features/podcast/item/trade-marks-for-sport-events-how-wimbledon-secured-their-colour-mark.
26 Nestlé India v. Mood Hospitality, (2010) ILR 3 (Del.) 560.
27 Hem Corporation v ITC Limited, 2012 (52) PTC 600 (Bom.).
28 Hawkins Cooker Ltd v. Murugan Enterprises, (2008) ILR 2 (Del.) 137.
29 Rana Steels v. Ran India Steels Pvt. Ltd., 2008 (102) DRJ 503 (Del.).
30 *Id.*

be infringed when a similar or identical mark is being used in the course of trade in relation to either identical or dissimilar goods or services, where the registered trademark has a "reputation" in India and the use of the mark without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark.

This remedy is dependent on the concept of "dilution" of a reputed registered trademark and is independent of the test of "consumer confusion". Such dilution occurs when the use of a mark would have an effect of diminishing or weakening the strength and identification value of the mark.

In *Ford Motor Co. v. C.R. Borman*,[31] the question before the court was if the use of word '*Ford*' in the footwear industry would infringe the Ford automobile mark. It was then held that since '*Ford*' was a highly reputed mark in India, the mark would be infringed if it was being used in relation to footwear to take unfair advantage. Recently, in *Tata Sons Limited v. Manoj Dodia and Ors.*,[32] the Court held that though the use of a mark may not cause confusion amongst the consumers as to the source of goods or services, it may cause damage to the reputation which the well-known trademark by diluting the trademark's power to indicate the source of goods or services.

Use of Names, Logos and Trademark Infringement - Position in Other Jurisdictions

Under the US law, the Lanham Act, 1946 ("**Lanham Act**") is the primary federal legislation for trade mark protection. The Lanham Act defines trademark infringement as the "reproduction, counterfeiting, copying or imitation in commerce of a registered mark *"in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive"* without consent of the registrant."[33]

The element of 'likelihood of causing confusion' in the above definition has been a matter of debate in trademark infringement cases in the US. For instance, in *National Football League (NFL) v. Wichita Falls Sportswear Inc.*,[34] the sportswear company was restrained by the National Football League from manufacturing and selling National Football League jerseys that created the likelihood of confusion among consumers. It was held that the use of the trademarks of NFL by the sportswear company would create a likelihood of confusion and violate trademark rights of NFL. It was discussed that it is key to assess in such cases whether the public believes that the product bearing a mark identical to a registered trademark originates from or is somehow endorsed by the registered owner of the trademark.

In a similar manner, courts in United Kingdom (**UK**) and the EU consider that the essential function of a trademark was to guarantee the origin of goods or services and that any use, which was likely to jeopardize that guarantee, will constitute infringement. For instance, the Court of Appeal in the case of *Arsenal Football Club PLC v. Reed*,[35] upheld the claim of infringement because the sale by defendant of the merchandise bearing the Arsenal's marks carried the same inference as to origin of those sold by Arsenal. Although the trademarks were considered to be "badges of support," they also acted as an indication of origin to a substantial number of consumers.

Moreover, similar to the Indian position, the US, the EU, and the UK, also have a well-developed concept of dilution. In the US, the Trademark Dilution Revision Act, 2006 entitles the owner of a famous mark to injunctive relief against a person who commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury. Similarly, the UK provides protection against dilution to marks enjoying a reputation but in contrast to the US approach, the European Court

31 Ford Motor Co. v. C.R. Borman, 2009 (39) PTC 76 (Del.).
32 Tata Sons Limited v. Manoj Dodia & Ors., 2011 (46) PTC 244 (Del.).
33 The Lanham Act, 15 U.S.C. §§1051 et seq., §32.
34 National Football League v. Wichita Falls Sportswear Inc., 532 F. Supp. 651 (1982).
35 Case C-206/01, Arsenal Football Club PLC v. Reed, 2002 E.C.R.

of Justice in a reference by the UK Court of Appeal, has held that in order to constitute dilution, it was necessary to evidence a change in the economic behavior of consumers of goods and services for which the earlier mark was registered.[36]

Based on the above discussion, the Indian position on trademark infringement is clear. If a registered Proprietor's trademark is used by another as a trademark in relation to goods or services in respect of which the trademark is registered, or if use is such that it dilutes the trademarks of the registered Proprietor, a claim of infringement may be sustainable. However, the marks likely to be used by fantasy sports game operators, would not be a use of such trademark "in relation to the services for which the trademark has been registered" by the Proprietor. In a nutshell, while fantasy sports game operators use trademarks of Proprietors, their business is different from that of the Proprietors. Moreover, the requirement that the use of the mark by a fantasy sports game operator is "likely to be taken as being used as a trademark" of the fantasy sports game operators is not satisfied because use of trademarks of Proprietors would not be such that the public associates the mark used by the fantasy sports game operator with the mark owned by the Proprietor. This element of likelihood of confusion as emphasised in other jurisdictions is improbable in the case of fantasy sports game operators because it does not in any manner suggest endorsement of the fantasy sports game by the registered Proprietors of trademarks, but is used only for the functional purpose of identifying the Players, teams and matches. It may be noted here that almost all fantasy sports game operators use the same players for drafting teams and to organise their fantasy sport games. It is highly unlikely for a man of ordinary intelligence to believe or be confused that any Proprietor of a registered trademark would be associated with, endorse or sponsor each and every fantasy sports game operator.

It may however be argued that the Player names, team names and logos as used by fantasy sports game operators constitute dilution. However, the requirement to prove unfair advantage or detriment to the distinctive character or repute of the registered trademark may defeat such a claim. Fantasy sports game operators may argue that the element of dilution of "causing detriment to the character or repute of trademark" is not met in their case, as the display of matches on fantasy sports gives an accurate result of the real match played and in no way tarnishes the teams or the Players. Instead, as previously stated, fantasy sports games are practically advantageous and not unfair to the Proprietors of the registered trademark.

Use of Names, Logos and Passing Off Under Trademark Law - Position in India

The aim of the law governing passing off states that no person has the right to pass off his goods or services as being the goods or services of another and Indian law and courts have also recognized the same.[37] In *ICC Development v. Arvee Enterprises*,[38] the International Cricket Council had filed a suit seeking an ad-interim injunction against Arvee Enterprises to restrain them from publishing any advertisement associating themselves with the plaintiff and the 'Cricket World Cup' in any manner, whatsoever, as it amounted to passing off. It was held that there may be a case of passing off where the defendant has promoted his product or business in such a way so as to create the false impression that his product or business, is in some way approved, authorized, or endorsed by the plaintiff or that there is some business connection between them in order to use the goodwill of another.

This concept of passing off by suggesting false endorsement also came to light in *D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.*[39] In this case, Daler Mehendi, a famous personality and singer, had assigned all his trademark rights, title, and interest in his personality and the goodwill vested in it to D.M. Entertainment Private Limited and therefore, all the related rights only vested with such entity. The plaintiff alleged that the defendant, a toy shop, without authorisation from the plaintiff, sold Daler Mehendi dolls and therefore misappropriated the artists' persona and likeness. The Court, in holding Baby Gift House liable, observed that

36 Case C-252/07, Intel Corp. v. CPM UK Limited, 2008 E.C.R.
37 The Trademark Act, 1999, §27; World Wrestling Entertainment Inc. v. Reshma Collection and Ors, 2017 (70) PTC 550 (Del.); Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd, (2001) 5 SCC 73.
38 ICC Development v. Arvee Enterprises, (2003) 26 PTC 245 (Del.) ("Arvee").
39 D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., 2010 CS (OS) 893/2002 (Del.) ¶15 ("DM Entertainment").

an individual claiming false endorsement must prove that the use of the identity likely misled consumers into believing the concerned personality endorsed the product at issue.

In *Gautam Gambhir v. DAP & Co & Ors.*,[40] the Delhi High Court decided on a case where restaurants were using the name of famous Indian cricketer "Gautam Gambhir" as their tradename. This case discussed the above judgment in *D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.* and held that mere use of the name of a celebrity does not result in suggestion of endorsement or sponsorship as long as no overt act has been attributed to the defendant whereby he attempted to make representation to any individual or public at large that the restaurants were owned or endorsed by the plaintiff.

Use of Names, Logos and Passing Off Under Trademark Law - Position in Other Jurisdictions

The law of passing off, which originates from the UK common law, is regarded as an act of unfair competition under the common law system,[41] but the UK does not have a statute of unfair competition prevention law.

Passing off in the UK is a deceit tort, and it happens once the infringer takes advantage of goodwill of the registered Proprietor's trademark by misrepresentation, so that his goods or services can be regarded by the consumers as belonging to owner of the trademark.

Similarly, the law of passing off has been equated to "unfair competition by misrepresentation" in the US, where passing off is treated as a form of unfair competition.[42] Claims for passing off can be brought against two distinct types of "unfair competition": (i) infringement of unregistered trademarks, service marks, trade names, and trade dress, and (ii) false advertising and product disparagement.

The right of publicity has also been claimed under the Lanham Act in the US, which provides persons with the legal right to prevent "false designation of origin" or "attribution" with regard to their names, likeness, and public identities thereby ensuring their ability to exploit the commercial value of their identities. The legislation prohibits unauthorised use of information that is likely to cause confusion or a mistake, or to deceive as to the affiliation, connection, or association with another person, with respect to the origin, sponsorship or approval of goods, services or commercial activities by another person.

Therefore, the position in India and the UK is such that the courts would allow the claim of passing off in cases where the infringing goods or services use the mark of proprietors in a manner to suggest false endorsement or association with the true Proprietor of the trademark. To ascertain the same, courts consider it essential to assess whether there has been any act on the part of the alleged infringing party to suggest any association or such endorsement with the registered Proprietor.

Similarly, in the US, a claim under the Lanham Act must demonstrate that the use of Players' identities by a fantasy sports game operator suggests that the fantasy sports game operator's operations are endorsed, sponsored, authorised, or associated with the Player or Proprietor whose names are used for game play. However, if the use of the player's identity is deemed to provide an informational function of identification, without misleading consumers as to the sponsorship or approval of the use, violation under the Lanham Act is difficult to prove.[43]

The position of law with respect to passing off favours the fantasy sports game operators as there is no overt act on the part of fantasy sports game operators which gives an impression that the Player or leagues are endorsing fantasy sports games in any manner. Instead, several websites take the cautious approach and use a disclaimer to specify that these fantasy sports games are neither endorsed by the Players or the leagues, nor do they endorse them. Moreover, the use of team names, Player names, and logos are purely for

40 Gautam Gambhir.v. DAP & Co. & Ors., 2017 CS (Comm.) 395/2017, IA Nos. 8432 and 6797/17 (Del.).
41 Mary LaFrance, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*, 2011 Mich. St. L. Rev. 1413.
42 The Lanham Act, §43(a).
43 Bi-Rite Enterprises, Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983).

the creation of teams by the users. Fantasy sports game operators may consider minimal use of player IP except as required for the sole purpose of identification and may do well to nevertheless obtain a license from the Proprietors for the use of the trademarks.

The use of registered trademarks in logos and names by fantasy sports game operators may also be covered under the defence of nominative fair use or denominative use. The defence is applicable in cases where a mark is used by a third party merely in order to identify the product of registered trademark's proprietor.

The use of registered trademarks in logos and names by fantasy sports game operators may also be covered under the defence of nominative fair use or denominative use.

Although the concept is not codified in the Trademark Act, the courts in India have recognized this concept. In *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*,[44] the Madras High Court upheld the essentials as laid down in *New Kids on the Block v. News Am. Publishing Inc.*[45] and stated that the following are the three requirements for applicability of defence of nominative fair use:

a. the product or service in question must be one not readily identifiable without use of the trademark;

b. only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and

c. the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

It is interesting to note the court's stance in *Tata Sons Limited v. Greenpeace International & Anr.*,[46] where Greenpeace had launched a game called 'Turtle v. TATA' to draw attention of the public to the alleged destruction of the 'olive ridley turtles' nesting habitat by the construction of the Dharma Port by TATA. In this game, Greenpeace had depicted TATA as antagonists which had to be destroyed by the turtles. According to the Delhi High Court, "there will be no infringement if the user's intention is to focus on some activity of the trademark owners, and is "denominative", drawing attention of the reader or viewer to the activity."

Likewise, in the US, Section 33 of the Lanham Act outlines the defence for trademark infringement when the name or service is "used in good faith". It can be used as a defence for infringement of a trademark "if the only practical way to refer to something is to use the trademarked term."[47] The US Court of Appeals, Ninth Circuit's judgment on *News Kids on the Block v. News America Publishing*, was the first case to enumerate this defence as one of nominative fair use.

This concept of nominative fair use is similar to the defence of referential use or informative use in UK and EU. Recently, the defence was added in new EU Trade Mark Regulation[48] to state that there can be no prohibition on the use of marks "for the purpose of identifying or referring to goods or services as those of the proprietor of that trademark."

Applying the aforementioned principles to fantasy sports games, for the defence of fair use to be applicable to fantasy sports game operators, it is important to consider the manner in which fantasy sports game operators use that information. Fantasy sports game operators use the Player names and logos to the extent reasonably necessary to identify the product or service i.e. the use of the name of the players serve the essential function of identifying the name of the Player with whom the statistics are associated, and the logo

44 Consim Info Pvt. Ltd v. Google India Pvt. Ltd., 2013 (54) PTC 578 (Mad.).
45 New Kids on the Block v. News Am. Publishing Inc., 971 F.2d 302 (9th Cir. 1992).
46 Tata Sons Limited v. Greenpeace International & Anr., 178 (2011) DLT 705.
47 Century 21 Real Estate Corp. v. LendingTree, Inc., 425 F.3d 211 (3rd Cir. 2005).
48 Regulation (EU) 2015/2424 of the European Parliament and of the Council, art. 12.

is serving the function of identifying the matches that are being played. Thus, it may be argued that the intention is to focus on the activity of the trademark owners which can only be said to be nominative fair use of the trademark. Accordingly, while debatable, the defence of nominative fair use can be taken up by fantasy sports game operators.

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Player Names and Publicity Rights

In addition to protection under trademark and copyright law, the rights of Players in their identity also enjoy protection as 'publicity rights'. Therefore, a question remains as to whether use of components of their personality, especially Player names, would infringe upon the 'publicity rights' of Players.

Position in India

Publicity rights are a broad, nebulous set of rights that vest in indicia of an individual's personality, including rights over the individual's image, trait, likeness, name and character.[49] Consequently, use of certain elements of a Player's professional career, and particularly their names, will have to be examined from the perspective of such publicity rights. We have discussed below the position in relation to the publicity rights of Players in the context of use of Facts by fantasy sports game operators.

The Delhi High Court in *ICC Development v. Arvee Enterprises*[50] recognised the right of publicity, wherein it was held that the right of publicity has evolved from the right of privacy and inheres in an individual or in any indicia of an individual's personality like his name, personality, etc., and the individual is allowed to profit from it. This case also distinguished between the rights available to an individual i.e. publicity rights and the rights available to entities, being copyright and trademark protection and unfair trade competition law.[51]

Later, in context of celebrities, the Delhi High Court in *Titan Industries v. Ramkumar Jewellers*[52] recognised that there was an infringement of publicity rights when the celebrity was identifiable from the unauthorised use of any indicia of personality. It requires no proof of falsity, confusion, or deception once this threshold is met.

The Madras High Court in *Shivaji Rao Gaikwad v. Varsha Productions*[53] relied upon the above decision and held that the use of the name of Rajnikanth, a popular actor, in a movie and resemblance to his persona would amount to infringement of his right of publicity, and no unauthorised use of the same was permitted.

Recently, in a landmark judgment on an individual's right to privacy, Justice Sanjay Kishan Kaul of the Supreme Court in *Justice K.S. Puttuswamy (Retd.) v. Union of India*[54] elevated the issue of personality rights, from its status as a common law right to a constitutional right, embraced by the fundamental right to privacy under Article 21 of the Constitution of India ("**Constitution**"). The Court stated that every individual has a right to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity and prevent the unauthorised use of such elements. Specifically, the Court held that the right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with him/her. This recognition of the right to privacy from which publicity rights are derived as a constitutional right raises a debate about its interplay with the constitutional right of freedom of speech and expression.

49 Arvee, *supra* note 38.
50 *Id.*
51 *Id*, at ¶14.
52 Titan Industries Ltd. v. Ramkumar Jewellers, 2012 SCC Online Del 2382.
53 Shivaji Rao Gaikwad v. Varsha Productions, 2015 (62) PTC 351 (Mad.).
54 Justice K.S. Puttuswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

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While the position on commercial usage of Player names and other indicia of personality is clear, there is no clear pronouncement in respect of the rights of a Player vis-a-vis use of Facts that relate to them.

The interplay of publicity rights with Article 19 of the Constitution has been briefly touched upon by the Delhi High Court decision in *D.M. Entertainment Pvt. Ltd. v. Baby Gift House.*[55] It has expressed a word of caution that an over emphasis on a famous person's publicity rights should not have an effect of chilling the exercise of an invaluable democratic right guaranteed under Article 19(1)(a) of the Constitution. However, in this case, the Court eventually allowed the claim under an action of passing off through false endorsement for the use of the personal characteristics of a celebrity in products sold by Baby Gift House. In light of the eventual outcome in the above decision, it is difficult to fathom the exact stance that the Indian courts shall take regarding the freedom of speech and expression enshrined in the Constitution weighed against the Players'/Proprietor's publicity rights, including in their names and performance.

Position in Other Jurisdictions

Publicity rights of Players have been extensively dealt with and addressed by the US courts, by interpreting the scope and extent of the publicity rights guaranteed by the states based on common law, state statutes, or both. Publicity rights can be sought to be enforced when it is proved that there has been an unauthorised use of identity for commercial advantage, and where it can be proved that use of such information is detrimental to the commercial value in the identity of the said Player.

Traditionally, entities using the name or identity of an athlete in a sports themed product or advertisement would procure the license to do so. *Palmer v. Schonhorn Enterprises*[56] discussed the unauthorised use of names and profiles of, *inter alia*, golf legend Arnold Palmer by Schonhorn Enterprises in a game entitled 'Pro-Am Golf' in an effort to improve sales. Schonhorn Enterprises argued that the sportsmen had waived their rights by being well-known athletes, and the publicity of their career is a consequence of the same. Information about them was generally available in newspapers and magazine articles, and use of the same should not constitute a violation. The Court rejected the argument and held that it shall be unjust to allow the creator of a game to exploit and gain profits from the successes of another merely because the owner's accomplishments have been highly publicised.

Traditionally, entities using the name or identity of an athlete in a sports themed product or advertisement would procure the license to do so.

Similarly, in *Uhlaender v. Henricksen*,[57] the defendant's unauthorised production of a board game with over 500 player names and their statistics was challenged wherein the Court held that the Players also had a right of publicity in performance statistics, along with their names, likeness, and personal characteristics, which was infringed. Professional leagues have applied the principles derived from the above cases to maintain that the use of statistics in fantasy sports is akin to its use in board games, as incorporation of names and statistics is central to the marketability of the platform.[58] Therefore, both the above decisions favour the right of publicity of the players, preventing any commercial use of elements of publicity rights such as names, performance statistics, or other characteristics.

55 DM Entertainment, *supra* 39.
56 Arnold Palmer v. Schonhorn Enterprises, 232 A 2d 458 (1967), at 462.
57 Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).
58 Memorandum in support of Major League Baseball Players Association's Motion for Summary Judgment, CBC Distribution and Marketing v. Major League Baseball Advanced Media, E.D. Mo. Dec. 23, 2005, at 6.

In contrast, the California Court of Appeals in *Gionfriddo v. Major League Baseball*,[59] where former major league baseball players sued the league claiming that the league violated their rights to publicity by use of their names and statistics in their programs and websites, rejected the claims of publicity rights. The Court held that there is a significant public interest in the information conveyed by the league and that the use of a celebrity's likeness to promote a related product would not be violative of their publicity rights.

The 2007 decision of the Eighth Circuit Court in *CBC Distribution and Marketing v. Major League Baseball Advanced Media*[60] categorically held that the use of Players' names and statistics in CBC's fantasy sports games was protected under the First Amendment[61] of freedom of speech and press, even if it violates the publicity rights protection granted by State law. It was also observed that there is no requirement to establish that users are likely to consider the use of Player information as endorsement. Similarly, a Minnesota court ruled in favour of the fantasy sports game operator CBS Interactive in 2008, holding that the First Amendment rights trumped Players' right of publicity.[62] In light of the CBC judgement, larger fantasy sports games outlets such as ESPN have sought to renegotiate their licensing deals.[63] Recently, a US Court held that the usage of names and likenesses of players by fantasy sports operators fell under the "public interest" and "newsworthiness" exceptions under Indiana'sright of publicity statute.[64]

However, there have been precedents in the past to establish that information may not be allowed to be used by companies for unlicensed entrepreneurial use.[65]

In the EU, most countries recognize the right of publicity or right to privacy of celebrities, if not all individuals, in some form. Spain specifically prohibits the use of the name, voice, or picture of a person for the purpose of advertising, business, or a similar nature.[66] Germany also broadly covers the use of a person's identity through a general right of personality. However, like in the US, they allow the right to free speech, right to information and freedom of press, etc. to override this right, as seen in a case where the image of a famous German soccer player was used in a calendar sold to the public.[67] In spite of the distributor's clear commercial motive and the possible loss of the defendant's own commercial prospects, it was held that "the use of the image was connected to the informational needs of the calendar, rather than for strictly commercial ends."

Nominative and Commercial Use

A clear trend that emerges from the above discussion is that while the usage of Player names and other indicia of their personality may be circumscribed by publicity rights, such restriction is far clearer where such usage is commercial rather than nominative.

While the usage of Player names and other indicia of their personality may be circumscribed by publicity rights, such restriction is far clearer where such usage is commercial rather than nominative.

The use of Player names in fantasy sports games can fall in either of the above categories. Nominative usage arises as a necessary consequence of the usage of Facts by fantasy sports game operators. Often, such usage survives despite publicly available player statistics being converted into "fantasy points" or similar ratings in the fantasy sport game.

This sort of usage is a clear case where the idea of a fantasy sports game, i.e., engaging real life Players or their

59 Gionfriddo v. Major League Baseball, 94 Cal. App.4th 400 (2001) ("Gionfriddo").
60 CBC Distribution and Marketing v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007) ("CBC").
61 U.S. Const. amend. I.
62 CBS Interactive Inc. v. National Football League Players Association, 2009 WL 1151982 (D. Minn.).
63 John Ourand & Eric Fisher, *ESPN Seeks Better MLBAM Terms*, Street & Smith's Sports Bus. J., Jan. 21, 2008.
64 Daniels et al. v. Fanduel, Inc., et al., Case No. 16CV01230(TWP-DKL), 2017 U.S.
65 Doe v. TCI Cablevision, 110 S.W. 3d 363, 366 (Mo. 2003).
66 Spain, Organic Law of May 5, 1982, art. 7.
67 BGH NJW 1979, S. 2203 (Beckenbauer).

teams in a virtual contest can only be expressed in one way, i.e., by using their names to identify them. Indeed, such usage may be argued to be *scénes á faire* not only for fantasy sports games, but the reporting of any matter, news or opinion surrounding a Player. Interestingly, this analysis begins to border on the traditional grounds for assailing and limiting publicity rights, i.e., their potential chilling effect on free speech and expression.

US jurisprudence limiting Player publicity rights on grounds of safeguarding free speech[68] and permitting usage of Facts by fantasy sports game operators absent damage to the Players' value in their identity[69] is likely to be looked upon favourably by Indian courts. Consequently, nominative usage by fantasy sports game operators is unlikely to fall afoul of publicity rights.

Using Player indicia in a manner that is promotional or in any manner intended to increase the commercial appeal of a fantasy sports game, is unlikely to enjoy any protection on the above grounds.

There exists another type of usage of Player names which may not be so nominative. Using Player indicia in a manner that is promotional or in any manner intended to increase the commercial appeal of a fantasy sports game, is unlikely to enjoy any protection on the above grounds. For such usage at least, fantasy sports game operators run the risk of infringing on Players' rights of publicity by using Facts.

Part III - Use of Images

Fantasy sports game operators use images, caricatures, photographs and animations of Players alongside their statistics (collectively referred to as "**Images**") on their websites and applications to allow identification of Players and enable Participants to draft players for their fantasy teams. This may be an issue and potentially an alleged violation of the copyright and/or the publicity rights of the respective Proprietor of such images. We have discussed below the position of Indian copyright law and publicity rights available with Players in the context of use of their images.

Images, whether of a celebrity or otherwise, are copyrightable in India as artistic work under the Copyright Act if original. Only the owner of a copyright has the exclusive right to reproduce the Image in any manner.

Images and Copyright Law

Position in India

Images, whether of a celebrity or otherwise, are copyrightable in India as artistic work under the Copyright Act if original.[70] Only the owner of a copyright has the exclusive right to reproduce the Image in any manner.[71] The photographer or the artist shall be the first owner of the copyright in an Image, unless the Image was commissioned or clicked under a contract, such as for a newspaper or magazine. Thus, the photographer, the Player, professional league or broadcaster, the publisher of the image or other such Proprietor could be the owner of the copyright in the Image.

Moreover, such copyright shall exist in the above stated manner even if the Image is freely available on the internet, which is true for images of most celebrities. The argument that the Image is in the public domain due to its publication on the internet would not stand as a defence to a claim of copyright infringement. However, there exist a few websites that allow the owner of the copyright to license their work for free for usage by the public.[72] Except for download and use of an image available on such websites, any other use

68 CBC, *supra* note 60.
69 Gionfriddo, *supra* note 59.
70 The Copyright Act, 1957, §13(a) read with §2(c).
71 The Copyright Act, 1957, §14(c).
72 *Ref* Creative Commons, Morgue File, PixaBay, Wiki Commons, Shutterstock, etc.

shall be deemed infringement, unless a valid license is obtained.[73] In *Kesari Maratha Trust v. Devidas Tularam Bagul*,[74] the Bombay High Court held that publication of a photo without the permission of the photographer by copying it from another published material is infringement of the copyright in the photograph.

Position in Other Jurisdictions

Similar to the protection afforded to artistic works in India, other jurisdictions, like the US, Australia, and Germany, also consider Images as a copyrightable subject matter and the owner of the copyright has the exclusive right to reproduce, display, prepare derivative works, and distribute copies of the Image.[75]

It can be concluded from the above discussion that there exists an almost undisputed copyright protection for Images and any unauthorised use is certainly prohibited. Therefore, fantasy sports game operators would do well to ensure that they obtain license from the photographer, the Player, professional league or broadcaster, publisher, or other such Proprietor that owns an Image before using the same on their website.

One of the driving factors behind a Player's ability to profit from the commercial value of his Image is the relatively recent development of the right of publicity.

Images and the Right of Publicity

Position in India

In addition to the copyright protection that vests with an owner of the Image, the Players themselves have a right of publicity as discussed above,[76] in their Images. In fact, one of the driving factors behind a Player's ability to profit from the commercial value of his Image is the relatively recent development of the right of publicity.[77]

73 The Copyright Act, 1957, §51.
74 Kesari Maratha Trust v. Devidas Tularam Bagul, 1999 (19) PTC 751 (Bom.).
75 US Copyright Act, 1976, 17 USC §106; UK Copyright, Designs and Patents Act, 1988, Section 4; German Law for Copyright and Similar Protection, §2; Australia Copyright Act, 1968, §10.
76 See *Player Names and Publicity Rights*.
77 Laura Lee Stapleton and Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 Marq. Sports L.J. 23 (1999).

Publicity rights of a celebrity's image have been discussed extensively in the case of *DM Entertainment v. Baby Gift House*,[78] wherein, as discussed above, the use of a popular celebrity's persona in a commercial product was held to be improper. The court quoted the observation in *Ali v. Playgirl*[79] where it discussed that the distinctive aspect of the right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person, and protects his proprietary interest in the profitability of his public reputation or persona.

Position in Other Jurisdictions

Interestingly, the term 'right of publicity' was first coined in the US by Judge Jerome Frank in *Haelan Laboratories v. Topps Chewing Gum*,[80] where the sale and marketing of picture cards of baseball players without their consent was held to be a violation of their right of publicity. It categorically held that the right of publicity would yield the celebrities no money unless it could be subject of an exclusive grant which barred any unauthorised use of their pictures. This right can only be abrogated when the use of the image is held newsworthy, in which case it shall give way to freedom of the press.[81] In *Zacchini v. Scripps-Howard Broad Co.*, the court ruled that the broadcast of Hugo Zacchini shooting himself out of a cannon by the television station effectively deprived the performer of the act's commercial value and constituted unjust enrichment on behalf of the station by receiving for free what others had paid to view.[82]

France and Germany specifically prohibit the unauthorised use of a person's image in their Civil Code[83] and Constitution[84] respectively. While Article 42(c) of the French Charter of Professional Football states that the commercial use of a players' image shall be for the benefit of the player solely, a German court ruled that Electronic Arts, a California based games company, could no longer sell their FIFA World Cup 2002 game in Germany as the plaintiff, Oliver Kahn, had not given it permission to use his image.[85]

English law, however, steadfastly refuses to adopt or recognize that a person has a right to his or her name, or identifying characteristics, such as voice or image. Claims against unauthorised use of such elements can only be made under available tort law principles, such as malicious falsehood, false endorsement, defamation, libel, passing off, etc.

The tort of passing off in the UK, which has often been held to have striking similarities to the US concept of right of publicity,[86] protects the property interest one would have in business goodwill. This was applied in the famous case of *Irvine v. Talksport Ltd.*, where a famous race car driver Edmund Irvine, sued a radio-station that used his image as a part of their promotional campaign.In its decision, the Court held that passing off can occur simply through the unlicensed use of someone's reputation or goodwill and it stated that it is very common that a famous person has an interest in exploiting the value of his persona outside his current field of activity[87]

An Image of a Player, even if available in public domain, is protected under copyright law as well as by the publicity rights of the Players.

Thus, an Image of a Player, even if available in public domain, is protected under copyright law as well as by the publicity rights of the Players. Any unauthorised use of the same shall therefore, amount to a violation/ infringement and may be subject to litigation. It will thus be wise to ensure that a valid license has been obtained for its use.

78 DM Entertainment, *supra* note 39.
79 Ali v. Playgirl Inc., 447 F.Supp. 723 (1978).
80 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).
81 Toffoloni v. LFP Publishing Group, LLC. 572 F.3d 1201 (11th Cir. 2009).
82 Zacchini v. Scripps-Howard Broad Co., 433 U.S. 562 (1977).
83 French Civil Code, art. 9.
84 German Constitution, art. 1 and 2.
85 Kahn v. Electronic Arts GmbH, unreported, 13 January 2004, OLG Hamburg.
86 Anna E. Helling, *Protection of "Persona" in the EU and in the US: a Comparative Analysis*, LLM Theses and Essays. Paper 45, (2005), http://digitalcommons.law.uga.edu/stu_llm/45.
87 Irvine v. Talksport Ltd., [2002] 1 W.L.R. 2355 (Ch.).

Conclusion

It is evident that the rapid growth of fantasy sports game operators has created several complex and currently unresolved IP issues. The usage of Facts and Identity has to be specifically assessed in context of the inherent IP in them, if any, for use in fantasy sports games.

Our analysis leads us to the broad conclusion that the nominative usage of Facts, including player names, statistics, logos of Players, teams and sports bodies, enjoys substantial protection against claims of both conventional IP infringement, as well as less clearly defined violations of publicity rights. This position is however not entirely free from doubt.

Our analysis leads us to the broad conclusion that the nominative usage of Facts, including player names, statistics, logos of Players, teams and sports bodies, enjoys substantial protection against claims of both conventional IP infringement, as well as less clearly defined violations of publicity rights. This position is however not entirely free from doubt.

More problematically, the unauthorized usage of Images almost certainly constitutes an infringement of copyright law as it currently stands, and the need of fantasy sports game operators for tenable means to use them is more pronounced.

Where the usage of Facts or Images goes beyond the strictly nominative, and borders on the promotional, the position becomes even more untenable for fantasy sports game operators.

Tackling these ambiguities is of the essence to balancing the needs of fantasy sports game operators and Proprietors, and enabling the usage and evolution of fantasy sports games as a genre.

While Proprietors including Players, leagues and teams are well within their rights to commercially exploit their IP or publicity rights, and protect against their unauthorized use by an fantasy sports game operator, they are also unlikely to be blind to the additional upside of successful monetization of these rights through fantasy sports game operators.

One solution that suggests itself is a collective licensing arrangement. Such mechanisms can, if properly structured, potentially address the need of fantasy sports game operators to lawfully use diverse and widespread third-party IP and publicity rights on their websites/mobile applications while avoiding price gouging and legal uncertainty.

Essentially, collective licensing arrangements allow right owners to assign or broadly license their rights, on an exclusive or non-exclusive basis, to bodies which can then license such rights either as a pool, or in individual instances, to interested stakeholders.

The body in question can then issue limited non-exclusive licenses to fantasy sports game operators allowing them to make use of the rights in question for the limited purpose of operating a fantasy sports game operator. The license in question can be structured to avoid common concerns such as merchandising overlaps, passing off, tarnishment, or non-denominative use, and involve a party agnostic and fair pricing mechanism.

The next question we must consider is what form of body is best suited to take up this role, the broad choice being between sports or tournaments leagues and media organizations on the one hand and Players associations on the other.

Our analysis of the rights necessary for the operation of fantasy sports games indicates that in addition to IP rights in Facts and Images, the publicity rights associated with both categories will need to be licensed to fantasy sports game operators as well.

The balance of convenience therefore appears to favour the operationalization of such licensing mechanisms through Players associations which can conveniently aggregate both of the above.

This approach is not completely novel. In the US, Players' IP and publicity rights are generally assigned to Players associations, such as the National Football League Players Association or the Major League Baseball Players Association or even the National Basketball Players Association (as a part of the standard contract), who in turn can license these rights to other interested stakeholders. In fact, the Major League Baseball Players Association was the first players' union to pioneer collective licensing agreements, when it entered into a two-year agreement with Coca Cola[88] in the late 1960s allowing it to produce coke bottles, decorated with Players' likeness in return for a flat fee. It also renegotiated the licensing agreement with baseball card publisher, Topps, doubling players' fees[89].

Players associations, the formation of which seems inevitable for various reasons[90], appear to be a suitable and convenient repository for the aggregation and collective licensing of a bundle of rights to operationalize fantasy sports games, and collective licensing, a suitable means for ensuring their use in a manner benefitting Players and fantasy sports game operators alike. While this is by no means the only (or indeed, the most convenient) way to enable the licensing of such rights where required by law, it does have the potential to create a robust, sustainable and fair means to do so.

88 Charles P. Korr, The End of Baseball as We Knew It: The Players Union, 1960-81, 54-55 (2002).
89 J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 Marq. Sports L. Rev. 87 (2006).
90 RM Lodha, et al, *Report of the Supreme Court Committee on Reforms in Cricket* (2015), at 43-46; *Football Players' Association of India Launched*, The Hindu, (Aug. 14, 2006), http://www.thehindu.com/todays-paper/tp-sports/football-players-association-of-india-launched/article18461469.ece

Online Gaming in India and the Need for Self-Regulation

By Ganesh Prasad[1]

Introduction

In 2016, the Indian online gaming market value was estimated at a whopping 300 million USD which is expected to rise 3.4 times by the year 2021 to 1.0 billion USD.[2] Despite the growth of online gaming, India has not introduced any regulatory framework to oversee this complex industry which exposes it to judicial and financial threats. Advancement and disruptions in technology along with access to internet and online games has increased the need for self-regulation.

Advancement and disruptions in technology along with access to internet and online games has increased the need for self-regulation.

Self-regulation can be understood as "a regulatory process whereby an industry-level organization (such as a trade association or a professional society), as opposed to a governmental organization, sets and enforces rules and standards relating to the conduct of firms in the industry."[3] It forms a vital part of the functioning of today's global economy.[4]

The Advertising Standards Council of India (ASCI), the Board of Control for Cricket in India BCCI), the Medical Council of India (MCI), etc., are leading examples of self-regulated bodies in India. This chapter does not discuss the legality of online gaming, fantasy sports, etc., but focuses on the need of a self-regulatory body in the online gaming space.

Why Self-Regulation?

In India, online gaming is not recognized as a subject matter under Schedule VII of the Constitution of India, 1950. However, the Constitution identifies gambling and betting as matters for legislation and has placed the same under List II, Entry 34 of the Seventh Schedule granting power to the State to legislate over this matter.

The Public Gambling Act, 1867 ("**PGA**") is the only leading and remote legislation on the concerned subject matter. This archaic PGA was introduced much earlier to the emergence of internet, because of which online gaming or online gambling do not find any mention in it. The PGA has been adopted by few states, including Bihar, Chhattisgarh, Madhya Pradesh, Punjab, and Uttar Pradesh. Other states have enacted their own gambling laws. In light of online gaming, the states of Sikkim[5] and Nagaland[6] have introduced specific statutes on online gambling. Both these states allow interested operators wishing to provide online gambling services within the state to apply for a license. Nagaland has expressly allowed operators to offer fantasy games services as well.

1 Ganesh Prasad is Partner, Khaitan & Co.
2 *Online Gaming Market Value across India in 2016 and 2021*, Statista, https://www.statista.com/statistics/754586/india-online-gaming-market-size/ (last updated Feb. 1, 2018).
3 Anil K. Gupta & Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational, and Political Analysis*, 8 The Academy of Management Rev. 417 (1983).
4 Daniel Castro, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, ITIF 1 (2011).
5 Sikkim Online Gaming (Regulation) Act, 2008.
6 Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015.

Innovation and Information Symmetry

The establishment of an autonomous regulatory body comprising representatives of various firms in the industry is essential. The involvement and participation of stakeholders ensure the formulation of a stronger regulatory framework due to the superior knowledge and higher technical expertise possessed by them in the practices and opportunities available for innovation in the industry.[7] Such knowledge and expertise may not necessarily be present in a government regulator. It also helps avoid conflicts of interest between stakeholders with different business models.[8]

The involvement and participation of stakeholders ensure the formulation of a stronger regulatory framework due to the superior knowledge and higher technical expertise possessed by them in the practices and opportunities available for innovation in the industry.

Further, the entire online gaming industry thrives on customer service satisfaction. Different firms compete to provide a better gaming experience to their customers. This type of an environment seems to be more favourable for a self-regulatory framework.[9] Scholars widely suggest the introduction of a system of ratings to provide consumers with information that would enable them to better protect their own interests and the interests of others from ill-suited content.

Moreover, self-regulation increases transparency in the industry by making industry and product information available to everyone, which encourages consumer participation. This leads to improved and symmetric information distribution.[10] Consumers are better aware of products' quality and safety, ultimately reducing consumer risks.

7 Thomas Gehrig & Peter-J Jost, *Quacks, Lemons, and Self-regulation: A Welfare Analysis*, 7 Journal of Regulatory Economics 309–325 (1995); P. Grajzl & P. Murrell, *Allocating Lawmaking Powers: Self-regulation vs Government Regulation*, 35 Journal of Comparative Economics 520-545 (2007).
8 Castro, *supra* note 3, at 7.
9 Industry Self-regulation: Role and Use in Supporting Consumer Interests, OECD 5 (2015).
10 *Id.* at 5.

Interest and Participation

The success of self-regulation depends on various factors. Interest of the industry to be self-regulated is one of them. This interest is dependent on the benefits available to the firms.[11] Interests of the industry, the government, and the consumers need to be aligned for a better impact of self-regulation.[12] The credibility and reputation of the regulatory body is based on the trust of the producers and consumers of the industry. Any regulation viewed as unfair and arbitrary will reduce the intent to comply with the same. When there is a large amount of uncertainty surrounding the results of institutional construction or little divergence between producers' and consumer's interests, the benefits of delegating regulatory powers outweigh the costs.[13]

Active participation of all stakeholders in the structure of self-regulatory bodies creates a system of checks and balances, by avoiding the promotion of self-interest of merely a few stakeholders in the industry, and establishing a regulatory structure benefitting all.[14]

Higher Compliance

The aim of the regulatory body should be to provide a level playing field that can facilitate the entry of newcomers, promote competition, and create incentives for the producers to comply with the regulations.[15] This helps to develop and maintain common standards in the industry.[16] Compliance in the case of self-regulation is higher due to the benefits of buy-in by industry members who may have helped design them, and who may thus have a vested interest in their success.[17] The degree of commitment under industry control may also be beneficial for consumers, as it may in some cases encourage businesses to reach higher standards.[18] Thus, compliance can be ensured by laying down sanctions which are substantial enough to discourage non-adherence.

Having a self-regulation scheme may enhance the opportunity to shape any forthcoming legislation. Self-regulation can be considered as a way to complete the laws by implementing incomplete legislations

Having a self-regulation scheme may enhance the opportunity to shape any forthcoming legislation.[19] Self-regulation can be considered as a way to complete the laws by implementing incomplete legislations.[20]

Response and Dispute Resolution

Faster and efficient response of the regulatory body to (a) adding and changing existing regulations to the uncertainties of the industry and (b) problems and queries of the industry participants is another advantage. Direct governmental regulations imply bureaucracy. Self-regulation being a flexible regulatory mechanism allows for faster response by the regulatory body to the changing nature of the industry and the industry uncertainties that are unforeseeable. This way, the industry can also eliminate the bureaucratic delays associated with governmental regulations.[21] The elimination of bureaucracy guarantees a lower transaction and compliance cost.[22] "A well-constructed self-regulatory regime has advantages over government regulation.

11 *Id.* at 23.
12 *Id.*
13 Grajzl & Murrell, *supra* note 6, at 540.
14 Castro, *supra* note 3, at 4.
15 OECD, *supra* note 8, at 11.
16 *Id.*
17 Margot Priest, *The Privatization of Regulation: Five Models of Self-Regulation* (1998).
18 OECD, *supra* note 8, at 19.
19 Anthony D. William, *An Economic Theory of Self-Regulation*, The Political Economy Doctoral Workshop 13 (2004).
20 Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 Journal of International Law and Politics 921–1013 (2003).
21 Christodoulos Stefanadis, *Self-regulation, Innovation, and the Financial Industry*, 23 Journal of Regulatory Economics 5–25 (2003).
22 *Id.*

It conserves limited government resources and is more prompt and flexible than government regulation, given the substantial time required to complete an investigation or to adopt and enforce a regulation."[23] Quick and efficient response prevents stagnation of innovation and promotes growth in the industry.[24]

Courts are the only way of dispute redressal for both producers and consumers in the case of direct governmental regulations. This can be avoided by adopting self-regulation. Dispute redressal for consumer complaints is made more efficient and effective which helps to build consumer trust. If consumers do not obtain satisfaction at the firm level, an active self-regulatory structure could provide them with an avenue for appeal to other approved bodies like courts.

Common Law v. Civil Law

Studies by various scholars show the inclination of common-law countries to have more self-regulation than the civil-law countries.[25] In civil law countries, the law originates from the Centre and they play a bigger role in regulating different professions.[26] On the contrary, common law countries are more decentralized and flexible, and there is more autonomy in the establishment of a profession.[27] Self-regulation is often chosen by industries in response to a threat of excessive or stricter governmental regulations which can be more costly and less flexible. Self-regulation gives firms greater scope to influence the standards set and a bigger influence on how they are monitored and enforced.[28]

Role of the Government

It is important to understand that self-regulation does not mean that the government has no role to play in its success. The government has a multi-faceted role to play in the success of self-regulation. It needs to ensure the proper establishment of the self-regulatory body. An advisory role of the government in ensuring that issues are adequately covered and that proposed measures will be effective in addressing these issues is very crucial.[29] The government should ensure the participation of the self-regulatory body and the related industry stakeholders while making key policy decisions that affect the industry. This will encourage a multi-stakeholder dialogue to come up with better solutions for the industry.[30]

Online gaming is not an exclusive industry. It is very much linked with other direct governmental legislation governing information technology, intellectual property rights, etc., which play a major role in the functioning of the online gaming industry. The government needs to ensure that self-regulation complies with these aspects as well. Monitoring and sanctioning is another way by which the government can help self-regulation work effectively.

The involvement of the government depends on many factors including political, social, and industrial. Based on these factors, the role of the government can be co-operative, delegated, devolved, facilitated or tacit.[31]

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23 *Self-Regulation in the Alcohol Industry*, Federal Trade Commission (2008).
24 Grajzl & Murrell, *supra* note 6, at 523.
25 Grajzl & Murrell, *supra* note 6.
26 Konrad Zweigert, & Hein Kötz, Introduction to Comparative Law (3d ed. 1998).
27 John C. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 Yale L.J. 1–82 (2001); Michael Burrage & Rolf Torstendahl, *Professions in Theory and History. Rethinking the Study of the Professions*, SAGE Publications (1990).
28 OECD, *supra* note 8.
29 *Id.*
30 *Id.*
31 Ian Bartle & Peter Vass, *Self-Regulation and the Regulatory State – A Survey of Policy and Practice*, 17 Centre for the Study of Regulated Industries 35 (2005).

Self-Regulation In Other Sectors

National

The BCCI is a body formed in 1928.[32] It is the sole body to govern and regulate the game of cricket in India which has received recognition from both the government as well as international organizations. BCCI has been an effective body to establish laws to govern the game and its participants at every stage in the country. Self-regulation is the heart and soul of this body. The rules and regulations of the BCCI range from establishing a code of conduct for the players to anti-doping laws to regulations for the governance of domestic leagues.[33]

The ASCI is a self-regulatory organization for the advertising industry. ASCI has adopted a Code for Self-Regulation in Advertising which seeks to ensure that advertisements to be legal, decent, honest and truthful and not hazardous or harmful while observing fairness in competition. The ASCI and its Consumer Complaints Council (CCC) deals with complaints received from consumers and industry stakeholders against different advertisements.[34] ASCI has created a sound and substantive set of regulations in the best interest of the public. It is another good example of the positive impact that self-regulation has had on industries in India and the self-regulatory mechanism implemented by it has been acknowledged and received judicial notice by the Supreme Court of India. It is particularly noteworthy that the self-regulatory mechanism implemented by ASCI has been acknowledged by and received judicial notice from the Supreme Court of India in *Common Cause (A Regd. Society) v. Union of India & Ors.*[35]

The MCI is one of the oldest organizations in India, and a self-regulatory body. The MCI has set teachers' eligibility criteria for appointment and promotions for undergraduate, postgraduate and super-speciality courses.[36] Broadly, the policies of the MCI are well appreciated by all stakeholders for its intentions and objectives.[37]

The Financial Industry Regulatory Authority (FINRA) has the ability to license securities dealers. It also has the ability to audit dealers and associated firms, to ensure compliance with the standards currently in place. The purpose is to promote ethical practices and improve transparency within the sector.

Further, FINRA is responsible for overseeing arbitration between investors, brokers and other involved parties. This provides a standard upon which various disputes can be addressed, though it also limits actions that can be taken outside the system. In cases where arbitration is mandatory, this is typically referred to as binding arbitration. An additional function taken on by a self-regulatory organization involves the education of investors regarding proper business practices they should expect.[38]

International and Transnational

The international environment has supported industry self-regulation. Transnational self-regulation has allowed organizations to address issues that are difficult to be addressed through inter-governmental co-operation, legal actions, or other means.[39]

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32 *History*, BCCI, http://www.bcci.tv/about/2017/history (last accessed Feb. 1, 2018).
33 *Rules and Regulations*, BCCI, http://www.bcci.tv/about/2017/rules-and-regulations (last accessed Feb. 1, 2018).
34 Sharad Vadehra, *Controlling Misleading Advertisement: Expanding Role of Self Regulating Mechanism in India*, Mondaq, http://www.mondaq.com/india/x/490426/advertising+marketing+branding/CONTROLLING+MISLEADING+ADVERTISEMENT+EXPANDING+ROLE+OF+SELF+REGULATING+MECHANISM+IN+INDIA.
35 WP No. 1024/2013.
36 Salient Features of Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998.
37 S. Bala Bhaskar, *The Mandatory Regulations from the Medical Council of India: Facts, Opinions and Prejudices*, 60, 11 Indian Journal of Anaesthesia 793-795 (2016).
38 *Self-Regulatory Organization – SRO, https://www.investopedia.com/terms/s/sro.asp* (last accessed Feb. 1, 2018).
39 OECD, *supra* note 8, at 9.

The International Organization for Standardization (ISO) is an example of self-regulation at an international level. It is an independent organization made up of members from national bodies which represent their country's standardization interests in the ISO system. This body has helped in minimizing errors and increasing productivity by providing strategic tools.[40]

At the European level, an example of self-regulation is provided by the Charter of the European Advertising Standard Alliance (EASA). EASA is a co-ordination point for bodies with the responsibility to apply codes of standards and practice established by self-regulatory organizations in response to consumer protection issues highlighted by the creation of the European Common Market.[41]

Conclusion

Self-regulation has proved to be very effective in the past for various industries. It is an efficient method to control the activities in budding industry. Allocating the rule-making powers to a self-regulatory body gives a greater ability to adapt to ever changing conditions of the industry. It ensures the constant growth of the industry and create a fair and safe environment for both the producers and the customers.

The online gaming industry is growing and evolving by the second. Self-regulation can help overcome market failure and prevent harms such as those to the consumer, the environment, the firms, and anyone related.[42] Corporate governance is another quality that can be enhanced with self-regulation by addressing issues like corporate social responsibility and ethical trading, and promote a regulatory regime with high standards of corporate reporting and governance which can improve competitiveness and general prosperity.[43] Therefore, self-regulation is the way ahead for the online gaming industry. In this context, a body such as the Indian Federation of Sports Gaming (IFSG) taking up the task of industry self-regulation has the potential to benefit the sports gaming industry and its various stakeholders in numerous ways, as further described above.

40 OECD, *supra* note 8, at 16.
41 *Id.*
42 Bartle & Vass, *supra* note 30, at 37.
43 *Id.*

Legal Status of Skill Based Fantasy Games in Indian States and Union Territories – Ready Reckoner*

Sl. No.	State or Union Territory	Applicable Legislation(s)	Skill Games – How Defined	*Skill Based Fantasy Sports Games (whether legal)*		Notes
				Free	Paid	
1	Andhra Pradesh	The Andhra Pradesh Gaming Act, 1974	"Games of Skill"	✓	✓	
2	Arunachal Pradesh	Arunachal Pradesh Gambling (Prohibition) Act, 2012	Information Unavailable	✓	✓	
3	Assam	Assam Game and Betting Act, 1970	No distinction between games of chance and games of skill.	✓	✗	Legal status of paid games of skill unclear as the Statute prohibits all forms of betting or wagering on any game or sport.
4	Bihar	Bengal Public Gambling Act, 1867	"Game of Mere Skill"**	✓	✓	
5	Chhattisgarh	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
6	Dadra and Nagar Haveli	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
7	Delhi	The Delhi Public Gambling Act, 1955	"Game of Mere Skill"	✓	✓	
8	Goa & Daman and Diu	The Goa, Daman and Diu Public Gambling Act, 1976	"Game of Mere Skill"	✓	✓	
9	Gujarat	The Bombay Prevention Gambling (Gujarat Amendment) Act, 1964	"Game of Mere Skill"	✓	✓	

Sl. No.	State or Union Territory	Applicable Legislation(s)	Skill Games – How Defined	*Skill Based Fantasy Sports Games (whether legal)*		Notes
				Free	Paid	
10	Haryana	Public Gambling Act, 1867	"Games of Skill"	✓	✓	
11	Himachal Pradesh	The Public Gambling (Himachal Pradesh Amendment) Act, 1976	"Game of Mere Skill"	✓	✓	
12	Jammu and Kashmir	The Jammu and Kashmir Public Gambling Act, 1920	"Game of Mere Skill"	✓	✓	Legal status of paid games of skill unclear as the Statute prohibits all forms of betting or wagering on any game or sport.
13	Jharkhand	Bengal Public Gambling Act, 1867	"Game of Mere Skill"	✓	✓	
14	Karnataka	Karnataka Police Act, 1963	"Games of Pure Skill"	✓	✓	"Games of Pure Skill" to be to be interpreted as "games of skill" to give effect to the intention of the statute.
15	Kerala	Kerala Gaming Act, 1960	"Game of Mere Skill"	✓	✓	Section 14A of the Statute provides the State Government with the power to expressly exempt skill predominant games from all or any provisions of the statute, subject to prescribed conditions.
16	Madhya Pradesh	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
17	Maharashtra	Bombay Prevention of Gambling Act, 1887	"Game of Mere Skill"	✓	✓	
18	Manipur	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
19	Meghalaya	The Meghalaya Prevention of Gambling Act, 1970	"Game of Mere Skill"	✓	✓	

	State or Union Territory	Applicable Legislation(s)	Skill Games – How Defined	*Skill Based Fantasy Sports Games (whether legal)*		Notes
				Free	Paid	
20	Mizoram	Information Unavailable	Information Unavailable	✓	✓	
21	Nagaland	Nagaland Prohibition of Gambling and Promotion and Regulation of Gaming Act, 2016	"Games of Skill"	✓	✓ (with Licence)	• The statute defines games of skill to include "all such games where there is preponderance of skill over chance, including where the skill relates to strategising the manner of placing wagers or placing bets or where the skill lies in team selection or selection of virtual stock based on analyses or where the skill relates to the manner in which the moves are made, whether deployment of physical or mental skill and acumen." • Fantasy Sports Games expressly defined as a game of skill. • License required for organizing games of skill, by payment of fees specified in the statute. • License valid for 5 years • License fee doubled after first 3 years. • License holders to pay levy to Govt at prescribed rate.
22	Odisha	Orissa Prevention of Gambling Act, 1955	No exemptions granted	✓	✗	Statute prohibits all forms of "gambling or gaming" which are defined to exclude lottery but include "a play or game for money or other stake and includes betting and wagering and other act, game and contrivance by which a person intentionally exposes money or things of value to the risk or hazard of loss by chance."

Sl. No.	State or Union Territory	Applicable Legislation(s)	Skill Games – How Defined	*Skill Based Fantasy Sports Games (whether legal)*		Notes
				Free	*Paid*	
23	Pondicherry	The Pondicherry Gaming Act, 1965	"Game of Mere Skill"	✓	✓	
24	Punjab	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
25	Rajasthan	The Rajasthan Public Gambling Ordinance, 1949	"Game of Mere Skill"	✓	✓	• Statute distinguishes a game of mere skill from a "game of chance" or a "game of chance and skill" combined. • Game of mere skill to be interpreted as a game where skill predominates over chance to give effect to the intention of the statute.
26	Sikkim	Sikkim Online Gaming (Regulation) Act, 2008 Sikkim Online Gaming (Regulation) Rules, 2000		✓	✓ (with Licence)	• License required for offering online games of any type. • Under the terms of the license, online games may only be offered within the physical premises of gaming parlours within the geographical boundaries of the state of Sikkim through intranet gaming terminals. • License is valid for a period of 1 year, after which renewal is necessary. • License specifies an online gaming levy of Rs. 50,00,00,000/- or 10% of the gross gaming yield, whichever amount is higher.
27	Tamil Nadu	Tamil Nadu Gaming Act, 1930	"Games of Mere Skill"	✓	✓	

Sl. No.	State or Union Territory	Applicable Legislation(s)	Skill Games – How Defined	*Skill Based Fantasy Sports Games (whether legal)*		Notes
				Free	*Paid*	
28	Telangana	Telangana Gaming Act 1974	"Game of Skill"	✓	✗	Statute, as amended by The Telangana Gaming (Amendment) Act, 2017 prohibits all forms of gaming for money, whether on games of skill or games of chance.
29	Tripura	Tripura Gambling Act, 1926	"Game of Mere Skill"	✓	✓	
30	Uttar Pradesh	Public Gambling Act, 1867 (No separate legislation)	"Game of Mere Skill"	✓	✓	
31	West Bengal	The West Bengal Gambling and Prize Competitions Act, 1957	"Game of Mere Skill"	✓	✓	

**Up to date as of 22 February, 2018*

*** With respect to state legislations that use the phrase 'game of mere skill' or 'games of mere skill', it can be inferred from judicial precedent and jurisprudence that these legislations will be interpreted in light of the 'predominance test' laid down in Dr.K.R. Lakshmanan v. State of Tamil Nadu . Therefore, games in which the element of skill predominates will be considered as games of 'mere skill' for the purposes of these legislations and will not attract the penalizing sections therein.*

[30] Bimalendu De v. Union of India, AIR 2001 Cal 30.
[31] AIR 1996 SC 1153.

Contributors

Gowree Gokhale is a senior leader at Nishith Desai Associates, and heads the technology-media and entertainment- telecom law practice as well as IP law practice of the firm with over 20 years of experience. She has advised several Indian and foreign gaming companies on a variety of issues, including general gaming laws in India, IP issues, setting up of India operations, payment solutions for gaming businesses (including virtual currency), mobile and internet gaming-related laws, tax issues, data protection and privacy issues. She is also a member of the International Masters of Gaming Law (IMGL) and a regular speaker at a number of international and domestic events and conferences.

Rishabh Sharma is a senior team member of the Gaming team as well as the Mergers & Acquisitions and Private Equity practice at Nishith Desai Associates. He advises several Indian and foreign gaming companies on a variety of issues, including general gaming laws in India, tax issues and assists them in setting up of India operations. He has also represented clients on complex acquisitions and investments across various other sectors.

Abhinav Shrivastava is a Senior Associate at LawNK. He completed his undergraduate degree at NALSAR University of Law in 2010, and his post-graduate degree in Regulation and Technology Law from King's College, London in 2012. He has been with LawNK since 2012 and has an interest in E-sport, gaming and technology and regulatory interventions in the technology space.

Nandan Kamath is Principal Lawyer at LawNK, a boutique law firm with a primary focus on the growing Indian sports, gaming media, healthcare and technology ecosystems. Nandan graduated with a B.A., LL.B. (Hons.) from the National Law School of India University, B.C.L. and M.Sc. degrees from the University of Oxford (on a Rhodes Scholarship) and an LL.M. from Harvard Law School. He acts as Managing Trustee of GoSports Foundation, a non-profit that provides scholarships and support to Olympic and Paralympic aspirant athletes from India.

R. Seshank Shekar is a Senior Associate at LawNK and a Senior Legal Counsel at Copyright Integrity International. Seshank has advised a wide range of clients in the sports and gaming industries, including federations, athletes, professional teams, fantasy sports games providers and agencies and has a particular interest in the sports governance, sports business and gaming spaces.

Arun Prabhu is a Partner at Cyril Amarchand Mangaldas (CAM). Arun is part of the Technology, Media and Telecommunications (TMT) group at the firm and has special expertise in advising clients in the electronics, information technology enabled services, outsourcing and information technology sectors. He was also a member of the Government of India's working group on the legal enablement of information and communication technology systems.

Rishabh Shroff is a Partner at Cyril Amarchand Mangaldas (CAM). Rishabh is part of corporate team and co-heads private client practice of the firm. He advises on foreign investments into India, private mergers & acquisitions, joint ventures, insurance, and property / real estate transactions. He also specialises in family constitutions and settlements, trusts, wills and succession planning. He is a Solicitor, Supreme Court of England and Wales and a core member of the Firm's Japan Desk.

Ganesh Prasad is a Partner at Khaitan & Co, and a member of its corporate and commercial law team. He is admitted to practice in India and England & Wales (NP). He specializes in domestic and foreign venture capital and private equity investments in a variety of sectors, including IT/ITES, gaming, financial services, insurance, education, human resource consultancy and real estate development. Ganesh has advised a number of clients across the gaming sector on a broad range of issues.

Editors: **Nandan Kamath** and **R. Seshank Shekar**

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THE Sports Law & Policy CENTRE
Bengaluru, India

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The Sports Law & Policy Centre, Bengaluru is an independent think-tank focused on interdisciplinary research, scholarship, education and institutional support for public and private enterprises in areas relating to the legal, policy and ethical issues affecting sports and gaming in India.

The Centre was formed as a collaboration between the GoSports Foundation and the law firm, LawNK. It comprises a group of professionals with extensive knowledge of and experience in working within the sports and gaming ecosystems in India. While sport and gaming in India is developing at a rapid pace, there exists room for legal debate and inquiry into the laws and policies that surround organised sports and gaming. The Centre aims to provide thought leadership, to encourage public debate and to bring knowledge-backed decision making into the national sports ecosystem by creating a forum for study, analysis and sharing of expertise.

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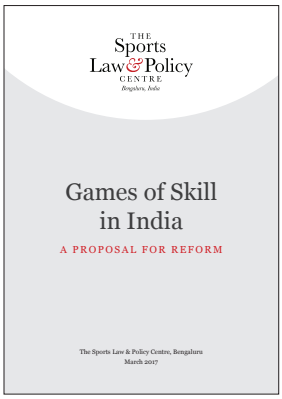

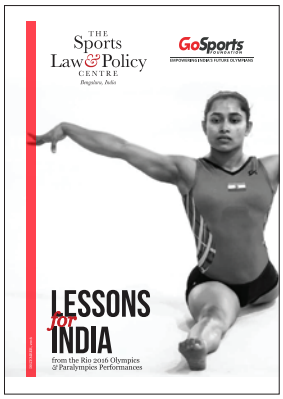


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